Retributive Justice and Hidden Sentencing

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I. INTRODUCTION

Blakely v. Washington's[1] potential impact on hidden sentencing proceedings[2] has been almost entirely unexplored. Largely concealed from the public eye, components of hidden sentencing such as probation, parole, and post-release supervision have been ignored by both scholars and policy-makers.[3] *Blakely* and its progeny, however, compel us to reexamine the nature of these proceedings that can significantly increase an offender's punishment, as well as the constitutional and theoretical problems that may arise. A consistent application of *Blakely* may well revolutionize these often neglected aspects of criminal sentencing.[4]

The Court's recent sentencing reforms also suggest a new philosophy of punishment for sentencing, something that has so far been woefully undertheorized.[5] In response, this Article identifies a new paradigm of retributive justice which underpins the Court's latest sentencing decisions. I contend that the Court's new understanding of sentencing is grounded in the rediscovered historical right of the jury to decide punishment for offenders—

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[1] Blakely v. Washington, 542 U.S. 296 (2004) (reaffirming a criminal offender's right to a jury's determination of facts which increase the maximum sentence).

[2] For the purposes of this piece, I define "hidden sentence proceedings" as those sentencing components taking place either before or after the actual sentencing hearing, often increasing an offender's punishment.

[3] Douglas Berman, Joan Petersilia, Jeremy Travis, and Robert Weisberg are notable exceptions.

[4] For purposes of this piece, I focus on six types of hidden sentencing proceedings: pre-sentence reports, prior offender statutes, probation, parole, post-release supervision, and restitution. I do not consider this a complete list, however—only the most common.

[5] As Doug Berman and Stephanos Bibas have noted, "[t]hough jurists and philosophers have long debated theoretical justifications for punishment, structural and procedural principles for sentencing have rarely received sustained attention." Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006).

specifically, in the community's central role determining an offender's moral blameworthiness.[6] Accordingly, I argue that an expressive retributive theory of punishment best explains the Court's most recent sentencing reforms. My conception of expressive retribution encompasses the historical antecedents of the Sixth Amendment jury right, the importance of community participation, and some very modern ideas of why we punish.

In short, I aim to explore the broader question of what *Blakely* means for all aspects of sentencing and where *Blakely*'s animating principle might lead, both practically and philosophically. I do so by analyzing a combination of sentencing doctrine, punishment theory, and empirical observations of sentencing schemes and applying them to hidden sentencing.

Blakely has focused attention on a broad swath of fact-finding decisions in sentencing. Some very important questions arise from these cases, such as: Where do "facts" originate? What makes them legitimate? Who may determine them? *Blakely* suggests that facts used in sentencing decisions can only be determined by one body: the jury. In so doing, *Blakely* opens the door to a host of complex and unanswered issues about the many other kinds of discretionary decisions informing all of sentencing. Nonetheless, *Blakely*'s potential effect on hidden sentencing has been almost entirely ignored.[7]

These hidden (or ancillary) sentencing proceedings function on the basis of factual determinations typically made far from the imprimatur of the jury or even a judge. They frequently serve as the functional equivalent of the original sentencing hearing, sometimes increasing the length and type of a convicted offender's punishment. Yet these proceedings receive little attention and oversight.

Although *Blakely* did not specifically address hidden sentencing proceedings, its animating principle—that the jury must find all facts increasing punishment[8]—raises important questions about who has authority

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[6] This modified expressive retributive theory of punishment also calls the use of plea bargains, guilty pleas, bench trials, and bench sentencing into question. Moreover, I would argue that similar philosophical concerns animate other areas of criminal justice, including the death penalty. I do not explore these curtailments of traditional jury rights here, however.

[7] *But cf.* Jeremy Travis, President, John Jay Coll. of Criminal Justice, Keynote Address at the Stanford Criminal Justice Center Symposium: Strategic Responses to Technical Violations of Parole and New Crime Among Parolees (Nov. 4, 2006) (transcript on file with author).

[8] Defining what the court meant by "punishment" is a central challenge of this piece. I do not believe that "every" imposition on prisoners or convicted offenders constitutes punishment. I would, however, define punishment fairly broadly, certainly including

to affect, enhance, or otherwise critically change a convicted offender's sentence. Broadly interpreted, the *Blakely* Court's statement that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"[9] will undoubtedly impact more than a small band of sentencing decisions.[10]

Extremely important decision making occurs during hidden sentencing, and it would be a mistake to neglect these proceedings in favor of a narrow interpretation of *Blakely*. Because *Blakely* encourages us to focus on questions of origin and legitimacy in sentencing, it should spur us to reevaluate the last twenty years of ancillary sentencing policy and practices, starting with *Jones v. United States*[11] and culminating with *Blakely*, *United States v. Booker*,[12] *Shepard v. United States*,[13] *Washington v. Recuenco*,[14] and *Cunningham v. California*.[15] Reviewing the *Blakely* line of cases helps illustrate the Court's movement towards a more expansive interpretation of the jury's role in determining all kinds of sentencing punishment.

Carefully explored, the animating principle of *Blakely* has much to teach us about the viability of hidden sentencing proceedings. Accordingly, I will examine *Blakely*'s effect on a variety of ancillary sentencing proceedings that take place both before and after the sentencing hearing. In doing so, I will also look at the jurisprudential underpinnings of the Court's recent sentencing decisions.

In Part II, I take a brief look at *Blakely*, *Jones*, *Apprendi*, *Ring v. Arizona*,[16] *Almendarez-Torres v. United States*,[17] *Shepard*, *Recuenco*, and

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most back-end sentencing practices. *See generally* Travis, *supra* note 7, at 4 (noting that the "workings of the back end of our justice" are forms of "invisible punishment"). For a more in-depth discussion of how philosophical ideas of punishment affect sentencing reform, see Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006).

[9] Blakely v. Washington, 542 U.S. 296, 313 (2004).

[10] As Doug Berman correctly argues, "the ramifications of *Blakely* for modern sentencing reforms—and for past, present, and future sentences—cannot be overstated." Douglas A. Berman, *The Roots and Realities of Blakely*, CRIM. JUST., Winter 2005, at 5, 6.

[11] 526 U.S. 227 (1999).

[12] 543 U.S. 220 (2005).

[13] 544 U.S. 13 (2005).

[14] 126 S. Ct. 2546 (2006) (holding that some errors in *Blakely* application can be considered harmless).

[15] 127 S. Ct. 856 (2007).

[16] 536 U.S. 584 (2002).

Cunningham. In particular, I review how the origins and legitimacy of facts in sentencing have been the Court's concern since at least *Jones* and how *Blakely* has newly focused our attentions upon this underexplored area of criminal sentencing. Part III explores how the Court's rediscovery of the Sixth Amendment jury right supports an expressive retributive jurisprudence of sentencing. Subsection A provides a brief history of American sentencing theory. Subsection B explains how expressive retribution supports the jurisprudence of recent sentencing decisions, which itself authenticates the *Blakely* changes to ancillary sentencing. Finally, Part IV addresses ancillary sentencing proceedings in the wake of *Blakely*. Subsection A uses expressive retributive justice principles as a guidepost for modifying ancillary sentencing proceedings. Subsection B reviews the history of hidden sentencing and surveys some common state ancillary sentences, both front-end and back-end. Throughout, I explore how *Blakely*'s animating principles and theoretical underpinnings might affect and reshape hidden sentencing.

If *Blakely* casts a bright beam of light on the subject of fact-finding at the primary sentencing proceeding, then I am ultimately interested in expanding the circumference of that beam. In so doing, I hope to further the "robust national dialogue"[18] about sentencing that *Blakely* has engendered, as well as enhance our understanding of the Court's new sentencing reforms.

II. ORIGINS AND LEGITIMACY IN THE JOURNEY TO *BLAKELY*

Blakely and its progeny may be recent decisions, but over the last decade, the Supreme Court laid the groundwork for this sentencing policy shift by gradually "re-discovering" a criminal offender's Sixth Amendment jury trial right during sentencing. Of course, the Constitution has always protected each criminal defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,"[19] and gives him the right to insist that "a jury find him guilty of all the elements of the crime with which he is charged."[20] As the Court recently commented, these two basic ideas—that all elements of a crime must be found by a jury, beyond a reasonable doubt, for a valid

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[17] 523 U.S. 224 (1998).

[18] Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT'G REP. 89, 93 (2004).

[19] In re Winship, 397 U.S. 358, 364 (1970).

[20] United States v. Gaudin, 515 U.S. 506, 511 (1995).

conviction—"provided the basis for [its] . . . decisions interpreting modern criminal statutes and sentencing procedures."[21]

Until quite recently, however, an offender's right to these Sixth Amendment guarantees was submerged in a century's worth of decisions that effectively hid the applicability of the right to jury trial criminal sentencing. To best see how this right was uncovered, we must return to the cases directly preceding *Blakely*, which laid the groundwork for this supposed "watershed" change in Court sentencing jurisprudence.

A. *Laying the Groundwork for* Blakely

The first real sign of the Court's Sixth Amendment rediscovery was in *Jones v. United States*,[22] a case largely ignored until *Blakely*.[23] *Jones* involved a statute that had three different possible maximum sentences, depending on the victim's harm. The Court held that because the harm to the victim was an element of the crime, this fact's determination must be given the full jury-based due process required by any other offense element.[24] In doing so, the Court observed that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[25]

One of the chief concerns in *Jones* was to determine the history and boundaries of the constitutional safeguards for fact-finding procedures,

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[21] *See* United States v. Booker, 543 U.S. 220, 230 (2005).

[22] 526 U.S. 227 (1999). Some scholars argue that the true predecessors to *Blakely* began much earlier with *In re Winship*, 397 U.S. 358, 361 (1970) (announcing the "requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt"), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (finding unconstitutional a Maine statute that shifted to defendant the burden of proving a *mens rea* lower than malice aforethought). *See* Robert Weisberg, *Excerpts from "The Future of American Sentencing: A National Roundtable on* Blakely," 2 OHIO ST. J. CRIM. L. 619, 624 (2005) (quoting Ronald Allen). *See also* Douglas Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 17–18 (2005). I regard *Jones* as containing the nascent seeds of *Blakely*, however, and begin my discussion there.

[23] I am not the first to re-examine *Jones* in light of *Blakely;* for other scholarly discussions, see Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y. & ETHICS J. 725 (2006); Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court Criminal Justice Panel*, 74 GEO. WASH. L. REV. 1073 (2006).

[24] *Jones*, 526 U.S. at 232.

[25] *Id.* at 243 n.6.

particularly the identity of the fact-finder.[26] By expounding on the history of criminal sentencing as well as the Framers' concerns over jury rights, the *Jones* Court underlined the importance of the jury's control over the ultimate verdict.[27] In doing so, the Court signalled that *any* future "relative diminution of the jury's significance" would raise Sixth Amendment concerns. Although limiting the specific holding of *Jones* to "removing control over facts determining a statutory sentencing range,"[28] the Court observed that "diminishment of the jury's significance" generally would "raise a genuine Sixth Amendment issue."[29]

Accordingly, the *Jones* Court's steadfast championing of the Sixth Amendment right laid the groundwork for much of the change in sentencing law that was—and is—to follow. *Jones* played oracle by suggesting that in a battle between traditional governmental policies in sentencing and the safeguarding of traditional jury rights, jury rights must triumph.[30]

Jones's message, however, was blunted by the *Almendarez-Torres* prior conviction exception. In *Almendarez-Torres*, the Court, by a 5-4 vote, ruled that Congress could provide an enhanced prison sentence for a federal crime based upon the fact of a prior conviction.[31] Since a prior conviction was only a sentencing factor, prosecutors were not required to charge in the indictment the fact of an earlier conviction, and the judge could make a finding that a prior conviction existed.

A year later in *Apprendi v. New Jersey*,[32] the Court continued to re-discover the historical Sixth Amendment jury trial right. *Apprendi* declared unconstitutional a New Jersey hate crime statute enabling a sentencing judge to impose a sentence beyond the statutory maximum for various crimes.[33] The Court held that a lengthened sentence resulting from the addition of a "sentence enhancement" was impermissible because "any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be

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[26] *Id.*

[27] *Id.* at 247.

[28] *Id.* at 248.

[29] *Id.*

[30] *Jones*, 526 U.S. at 251 n.11 ("[I]f such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees.").

[31] Almendarez-Torres v. United Sates, 523 U.S. 224, 226–27 (1998).

[32] 530 U.S. 466 (2000).

[33] *Apprendi*, 530 U.S. at 491. Under the New Jersey statute, the sentence determination was based on the trial court's finding that an offense involved racial animus by a preponderance of the evidence. *See id.*

submitted to a jury, and proved beyond a reasonable doubt"[34]—thus reaffirming what it had suggested in *Jones*.[35] Sentencing facts had to be proven beyond a reasonable doubt, just like any other offense, to preserve the jury's prerogative.[36]

The *Apprendi* majority clarified the "starkly presented"[37] question of whether a defendant had the constitutional right to have a jury find each and every factual element of a crime on the basis of proof beyond a reasonable doubt.[38] The Court relied on the historical foundations of the common law as a basis for affirmatively answering this question. In *Apprendi*, as in *Jones*, the Court returned to the communitarian role of the jury trial in ensuring that the state did not overreach its powers. These twelve jurors, "the great bulwark of [our] civil and political liberties,"[39] were supposed to be "twelve of [the defendant's] equals and neighbors,"[40] or part of the offender's community. Notably, *Apprendi* focused on how the traditional jury trial right required the jury to determine the truth of each accusation in *every* stage of the legal process.[41]

The Court's emphasis on the community's role in measuring levels of culpability—first discussed in *Jones*, where the Court considered how eighteenth-century English juries devised extralegal ways of avoiding a guilty verdict if the punishment for a certain offense seemed disproportionate to the offender's conduct[42]—suggests that a retributive philosophy of punishment, based on the defendant's moral blameworthiness, may best explain, at a jurisprudential level, what motivated the Court's decision that the jury (and, by extension, the community) had the right to decide all facts increasing punishment.

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[34] *Id.* at 490.

[35] *See id.* at 476 (noting that the Court's reasoning had been "foreshadowed by [its] opinion in *Jones*").

[36] Despite the strong language in *Apprendi*, however, the *Almendarez-Torres* rule regarding prior convictions remained. *Cf. Almendarez-Torres*, 523 U.S. at 225–27.

[37] *Apprendi*, 530 U.S. at 476.

[38] *Id.* at 476.

[39] *Id.* at 477 (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

[40] *Apprendi*, 530 U.S. at 477 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) [hereinafter BLACKSTONE]).

[41] *Apprendi*, 530 U.S. at 477.

[42] *See* Jones v. United States, 526 U.S. 227, 245 (1999) (cited in *Apprendi*, 530 U.S. at 480 n.5).

As Justice Scalia argued in his *Apprendi* concurrence, the Founders of the American Republic had no intentions of leaving criminal justice to the states.[43] Thus, the jury-trial guarantee was a very important provision of the Bill of Rights. This guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" promised the criminal offender that "all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."[44] This interpretation ultimately became law in *Blakely*.[45]

Following *Apprendi,* the Court's sentencing opinions more strongly supported jury-led fact-finding in criminal proceedings. In *Ring v. Arizona*,[46] the Court held that if a sentencing fact critically affected an offender's punishment, it was impermissible for the "trial judge, sitting alone," to determine "the presence or absence of . . . aggravating factors" required by a state to increase a death sentence.[47] Drawing heavily on Justice Stevens's previous dissent in *Walton v. Arizona*,[48] the *Ring* Court found that any fact-determined increase in punishment "must be found by a jury beyond a reasonable doubt."[49] Based on this historical understanding of the Sixth Amendment's scope, the *Ring* Court overruled "*Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[50]

Justice Scalia's *Ring* concurrence set out future grounds for *Blakely*, finding that:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them

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[43] *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

[44] *Id.* at 499 (Scalia, J., concurring) (quoting Breyer, J.).

[45] Blakely v. Washington, 542 U.S. 296, 301–02 (2004).

[46] 536 U.S. 584 (2002). On the same day as it decided *Ring*, the Court also issued *Harris v. United States*, 536 U.S. 545 (2002), where a fractured majority held that permitting a judge to find facts that required imposing a mandatory minimum sentence did not violate the defendant's constitutional rights.

[47] *Ring*, 536 U.S. at 588.

[48] 497 U.S. 639, 710 (1990) (Stevens, J., dissenting). Stevens argued that the Sixth Amendment required a jury determination of established facts before imposition of the death penalty, relying in part on late eighteenth-century English jury prerogatives. *Id.* at 710–11.

[49] *Ring*, 536 U.S. at 602.

[50] *Id.* at 609.

> elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.[51]

Scalia stated outright that he had "discarded [his] old ignorance"[52] in failing to realize that "the right of trial by jury is in perilous decline"[53]—something he would try to remedy in *Blakely*.

All of the above decisions, from *Jones* to *Ring*, helped lay *Blakely*'s groundwork. Although many in the academic and legal community were surprised by *Blakely*, the path to rediscovering the Sixth Amendment jury right was always present. It wasn't until *Blakely*, however, that the historical right to a jury trial was fully articulated.

B. *Jury Rights Triumphal in* Blakely

In *Blakely*, the Court found that Ralph Blakely's Sixth Amendment jury trial right was violated when a Washington state sentencing court enhanced his sentence based on its factual determination that his kidnapping offense involved "deliberate cruelty."[54] By holding that a court can only sentence a defendant on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself, the *Blakely* Court eliminated all judge-made enhancement of sentences beyond their maximum.[55] Specifically, *Blakely* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,"[56] defining "maximum sentence" as what "a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[57]

The *Blakely* Court found that its rule, originally set out in *Apprendi*, was supported by two historical pillars of common-law criminal justice. Quoting Blackstone, the Court observed:

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[51] *Id.* at 610 (Scalia, J., concurring).

[52] *Id.* at 611 (Scalia, J., concurring).

[53] *Id.* at 612 (Scalia, J., concurring).

[54] Blakely v. United States, 542 U.S. 296, 296, 305 (2004).

[55] Critically, the majority found that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* at 304 (internal citation omitted) (quoting 1 JOHN BISHOP, CRIMINAL PROCEDURE 55 (2d ed. 1872)).

[56] *Id.* at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[57] *Blakely*, 542 U.S. at 303.

> [T]he "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," and . . . "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason."[58]

The offender's right to a jury trial comprised of the community, the Court explained, was a key reservation of the community's power in the structuring of our government: "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, [a] jury trial is meant to ensure their control in the judiciary."[59] As *Blakely* illustrated with a number of historical sources, the jury-trial right was critical during the nation's founding—so much so that the Framers decided to entrench the jury-trial right in the Constitution because "they were unwilling to trust government to mark out the role of the jury."[60]

Moreover, *Blakely*'s wider understanding of the historical jury role also relied on the jury's function as the public's representative and as the primary provider of community-based punishment. The Court placed such importance on the jury's role during sentencing in part because of its recent—and related—emphasis on the community's traditional role in determining moral blameworthiness.

Blakely contended that the liberal democratic decision-making vested in the jury's determination of blameworthiness relies on the community's role in linking punishment to the crime committed, so that the offender will feel more responsibility for her actions. This tie between community-based retribution and the jury's role in finding all facts relevant to punishment was established by Blackstone, as *Apprendi* noted: "The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime."[61]

Stated differently, colonial Americans believed that the best way to ensure that the offender felt the moral weight and indignation of the community (as part of his punishment) was having the determination of that punishment handed down by a fair cross-section of said community, via the jury. Blackstone's long-standing tenet of criminal law, that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by

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[58] *Id.* at 301–02 (internal citation omitted).

[59] *Id.* at 306.

[60] *Id.* at 308.

[61] *Apprendi*, 530 U.S. at 478–79 (paraphrasing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, OF PUBLIC WRONGS 343 (1769)).

the unanimous suffrage of twelve of his equals and neighbours,'"[62] underlines this point. The reason for limiting the jury to an offender's "equals and neighbours" was precisely in order to impose the community's judgment. When the determination of culpability is handed down by an offender's fellow citizens rather than the state, not only is the legitimacy of sentencing punishment increased, but the normative judgment of the community is fully imposed.

From the earliest days of our nation, the jury trial was considered an essential part of criminal justice because the jury itself ensured the "judiciary remained accountable to, and aligned with, the interests of the citizenry it purported to serve."[63] In other words, one of the key roles of the jury at the time of the founding was to make sure that the community's concerns remained significant in the punishment of an offender.

This punishment was not something left to the judge, but rather a responsibility and right of a defendant's immediate society. As Akhil Amar observed, "[t]he jury was not simply a popular body, but a local one as well . . . composed of Citizens from the same community and . . . informed by community values."[64]

Indeed, the criminal jury trial right was protected in both Article III of the Constitution and the Sixth Amendment because Article III had no specific promise of the jury trial, and "many Anti-Federalists wanted an explicit guarantee that juries would be organized around local rather than statewide communities."[65] From the beginning, then, a key aspect of the criminal jury trial was the *community's* role in conveying punishment to criminal offenders.

Additionally, considering how many Revolutionary-era Americans deeply distrusted the judicial branch,[66] one of the primary reasons for enshrining the jury as the arbiter of criminal punishment was to ensure that

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[62] *Blakely*, 542 U.S. at 301 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 343 (1769)).

[63] Eric Fleisig-Greene, Note, *Why Contempt is Different: Agency Costs and "Petty Crime" in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1229 (2003).

[64] Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE. L.J. 1131, 1186 (1991). As Amar explains, the jury was central to both the Bill of Rights and the Constitution: "Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its absence strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth)." *Id.* at 1190.

[65] *Id.* at 1197.

[66] Revolutionary-era Americans' distrust stemmed from their experience with the British court system and the Stamp Act, among other outrages. *See* Fleisig-Greene, *supra* note 63, at 1230.

adjudication of crime was never severed from popular authority.[67] Thus the desire to protect the jury trial cannot be seen merely as a way to incorporate popular checks and accountability into the justice system, because the jury trial right guaranteed that the citizenry would have a direct hand in determining the moral blame of punishment.

In responding to the slow diminution of the jury right's traditional and proper scope, the *Blakely* Court firmly re-established the paramount territory of the jury in criminal decision-making and punishment.[68] As sentencing scholars have noted, the *Blakely* decision "reflects the need to give intelligible content to the right of the jury trial."[69] Indeed, it is difficult to read *Blakely* without concluding that the Court decided that "the sentencing revolution, which relied on judge-centered administrative sentencing procedures, must start granting defendants the full panoply of jury-centered adversarial procedures."[70]

It is possible, of course, to interpret *Blakely* more narrowly. A more restrained *Blakely* reading would only mean that juries must find facts increasing the "statutory maximum." If the definition of "statutory maximum" is itself limited to only the actual length of time the offender spends in prison, as opposed to all the other ancillary sentencing proceedings that can increase an offender's punishment, then *Blakely*'s scope is considerably constricted. However, this reading is extremely formalistic, with little to no underlying theory supporting it. A broader understanding of *Blakely* is indicated in both the pre-*Blakely* line of cases and its progeny.[71]

Another narrow reading of *Blakely*, first championed by Douglas Berman, argues that the jury trial right is not always triggered by the

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[67] *Id.* at 1230.

[68] As Alschuler, among others, has pointed out, at the time of the founding, juries often decided the law as well as the facts. Alvin Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903 (1994); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003). Accordingly, if *Blakely*'s power is partially derived from the jury's original role, then an extremely broad interpretation of the Sixth Amendment could encompass jury law-finding. However, the jury's role as a law-finder as well as a fact-finder was on its way out as early as 1794, and was almost completely gone by 1835. Alschuler, *supra*, at 907. In contrast, the jury's role as fact-finder and arbiter of punishment continues to be an essential part of the Sixth Amendment.

[69] Weisberg, *supra* note 22, at 629 (quoting Rory Little, *Excerpts From "The Future of American Sentencing: A National Roundtable on* Blakely," 2 OHIO ST. J. CRIM. L. 619, 629 (2005)).

[70] Berman, *supra* note 22, at 34–35.

[71] I discuss this further *infra* Part III.

authorization of punishment based on certain findings. This understanding of *Blakely* holds that juries need only determine offense conduct, not offender characteristics, since offender characteristics do not define a crime and thus fail to implicate the jury trial right.[72] Stated differently, according to this *Blakely* interpretation, "the Constitution's jury trial right does not preclude a judge from making alone those findings concerning offender characteristics that the law deems relevant to sentencing determinations."[73] This interpretation also helps clarify the *Almendarez-Torres* prior conviction exception, because the fact of a prior conviction goes to the offender's personal history—an offender characteristic rather than an element of offense conduct.[74]

The problem with this interpretation, however, is the difficulty in distinguishing offense from offender characteristics.[75] Although certain categories easily sort themselves out into one or the other, such as age, former employment, or schooling, other areas, such as criminal history,[76] rehabilitative promise, and determinations of "future dangerousness"[77] are mixed, making it difficult to classify as either conduct or characteristic.[78] Indeed, "[l]egislatures and sentencing commissions have an understandable and perhaps justifiable tendency to define punishment consequences in diverse, intricate, nuanced and interconnected ways that often will not facilitate easy offense/offender labeling."[79] Accordingly, it is hard to imagine creating a post-*Blakely* regime that incorporates such a distinction.

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[72] Berman, *supra* note 18, at 90.

[73] *Id.*

[74] *Id.*

[75] To be fair, Berman acknowledges this. *Id.*

[76] By "criminal history," I mean not only an offender's prior convictions, but also her juvenile history, narcotics use, prior indictments, foreign crimes, and other information that often shows up on Pre-Sentencing Reports (PSRs). Although Berman argues that criminal history falls squarely into "offender" characteristics, *see id.* at 90–91, this is not always the case. Although prior convictions normally can be categorized as offender characteristics, facts such as prior and current drug use, dismissed indictments, and uncharged crimes can be complicated to determine, and often have great effect on an offender's sentence.

[77] This was specifically mentioned by Berman as troubling. *See id.* at 91.

[78] Berman, on the other hand, argues that criminal history and rehabilitative promise are only offender-based characteristics, not mixed. In doing so, he over-simplifies the complex calculations that go into determining these facts, particularly in state sentencing systems.

[79] Berman, *supra* note 18, at 92.

Relying on this narrower interpretation of *Blakely*, Berman argues further that such mixed categories should be treated as offender characteristics rather than offense conduct because they "are not really part of the defendant's 'crimes' and thus are not essential jury issues."[80] But this kind of analysis just begs the question by reclassifying traditional jury issues—whether a defendant has obstructed justice, whether a defendant will be dangerous in the future, etc.—to leave them in the hands of the court. Stated differently, arguing that mixed categories should be treated as offender characteristics, and thus determined by the judge, is very similar to the argument that the Court specifically rejected in *Blakely* in regards to reclassifying sentencing factors as elements: "the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge."[81] A broader *Blakely* view, on the other hand, avoids this problem by assuming that only the most basic offender characteristics may be determined by non-jury actors.

Moreover, as Berman himself notes,[82] *Blakely*'s relatively broad language seems to reject such line-drawing—whether between mixed offender/offense categories or even distinguishing between offense conduct versus offender characteristics at all. This is particularly true in light of *Cunningham v. California*,[83] where at least six Justices seem to reject the offense/offender distinction entirely.[84]

The broad *Blakely* mandate stems from the importance the Court currently places on the role of the jury. The Sixth Amendment's "reservation of jury power,"[85] the "common-law ideal of limited state power,"[86] the re-discovered "Framers' paradigm for criminal justice,"[87] and the constitutional requirement that all facts legally essential to the punishment be proved to a

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[80] *Id.* at 91.

[81] Blakely v. Washington, 542 U.S. 296, 306 (2004).

[82] *See* Berman, *supra* note 18, at 95 n.18.

[83] 127 S. Ct. 856 (2007).

[84] *Id.* at 856 ("Justice Kennedy urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not . . . . *Apprendi* itself, however, leaves no room for the bifurcated approach . . . ." *Id.* at 869 n.14.). I discuss *Cunningham infra* Part II.C.

[85] *Blakely*, 542 U.S. at 308.

[86] *Id.* at 313.

[87] *Id.*

jury beyond a reasonable doubt[88] combine in *Blakely* to form a new principle for sentencing proceedings.

Granted, even with a wide-ranging interpretation of *Blakely*, it is still unclear precisely how broad its reading should be. In the most expansive of readings, a form of jury trial must be available for the determination of every fact—something even the most ardent supporters of a broad mandate would find difficult to endorse.[89] Accordingly, I would argue that the best way to understand *Blakely*'s animating principle is as a broad, but not unlimited, mandate.

Ultimately, by stating that the jury trial right applies to "all facts legally essential to the punishment,"[90] the Court rejects a narrow understanding of the jury's role. As discussed below, this rejection is confirmed by the post-*Blakely* cases.

Such an expanded jury role would also apply to most front- and back-end sentencing practices, particularly those which increase the criminal punishment meted out to the offender. As Mark Harris has noted, "*Blakely* is a call to all interested parties to think anew about the types of procedures that befit modern sentencing."[91]

C. *Steps Further Down the* Blakely *Path*

Since *Blakely*, the Court has continued to focus on the jury's role in finding facts that increase or enhance an offender's punishment. This is particularly true in *Shepard*, *Recuenco*, and *Cunningham*, each of which contains implications about *Blakely*'s eventual reach.

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[88] *Id.* at 313.

[89] Many specific *Blakely* problems in sentencing could be solved by allowing the jury the opportunity to give its imprimatur of approval to any facts determined by a non-jury actor, such as a bureaucratic official or the trial court. In other words, after all the relevant facts have been collected, in whatever form, they should be presented to a special sentencing jury for either adoption or rejection. This division of labor would uphold a broader *Blakely* mandate by involving the jury in every fact that increases an offender's punishment, while at the same time preserving much of the functioning of the current criminal justice system.

[90] *Blakely*, 542 U.S. at 313.

[91] Mark D. Harris, Blakely*'s Unfinished Business*, 17 FED. SENT'G REP. 83, 84 (2004) (addressing Berman's views).

1. Shepard

Shepard dealt with a judge's ability to determine certain facts in weighing an offender's prior conviction.[92] Specifically, the *Shepard* Court held that judges must confine their review of evidence concerning prior convictions to the charging document, the terms of the plea agreement, or the offender's admissions in an exchange with the trial judge.[93]

Most interesting about *Shepard*, however, was its broader implications for the future of the prior conviction exception. *Shepard* implied that the Court might eliminate this "last remaining exception to the *Apprendi* . . . ban on judicial fact-finding on enhanced sentences."[94] Moreover, Justice Clarence Thomas, writing separately, argued in his concurrence that the exception carved out in *Almendarez-Torres v. United States* had been continually eroded by the *Apprendi-Blakely* principles,[95] and the exception should be eliminated for good.[96] Moreover, *Shepard* supports a narrow reading of the prior conviction exception articulated in *Almendarez-Torres*, where facts related to the prior conviction but not adjudicated in the prior proceeding would fall outside the prior conviction exception. The majority in *Shepard* observed that:

> While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.[97]

This language limiting *Almendarez-Torres* to tight confines supports a wider interpretation of *Apprendi-Blakely* reasoning; if only a minimum of prior

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[92] Shepard v. United States, 544 U.S. 13, 16 (2005).

[93] *Id.* at 26.

[94] *See* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2005/03/state_prisoners.html (Mar. 7, 2005, 10:09 EST).

[95] *Shepard*, 544 U.S. at 27–28 (Thomas, J., concurring).

[96] *Id.* at 28 (Thomas, J., concurring). Thomas joined the *Almendarez-Torres* majority, but has since said that he "succumbed" to error in joining that ruling. Apprendi v. New Jersey, 530 U.S. 466, 520 (2000) (Thomas, J., concurring).

[97] *Shepard*, 544 U.S at 25. Jonathan Soglin at Criminal Appeal first made this point. *See* Posting of Jonathan Soglin to Criminal Appeal, http://www.crimblawg.com/2005/03/thoughts_about_.html (Mar. 8, 2005, 7:37 EST).

conviction facts fit into the exception, then all else may be subject to *Blakely*.

Shepard is important for a number of reasons, then. First, as others have noted, a number of "sentencing determinations depend on judicial findings of prior conviction facts (even in states without guideline systems), and . . . many pre-*Blakely* sentences have been affirmed post-*Blakely* by relying on the prior conviction exception," which itself hangs on the continuing validity of *Almendarez-Torres*.[98] And because most states have some sort of compulsory recidivism statute on the books, eliminating the prior conviction exception could have tremendous effect on every state's sentencing procedures.[99] Second, even if the prior conviction exception remains, the *Shepard* Court's expansive language and understanding of *Blakely*'s predecessors, *Jones* and *Apprendi*, combined with Thomas's concurrence, support an equally expansive understanding of *Blakely* itself.

2. Recuenco *and Harmless Error*

Another tantalizing footnote and some broad language from Justice Thomas in *Washington v. Recuenco*[100] also suggest a wider scope for *Blakely*. Ironically, this language is found in a case which held that it was harmless error to enhance a sentence enhanced in violation of *Blakely*.

Recuenco presented the question whether a sentence enhanced in violation of *Blakely*'s Sixth Amendment principle is amenable to harmless-error analysis under *Chapman v. California*,[101] or instead constitutes "structural error."[102] The *Recuenco* Court held that violations of *Blakely* rights can be subject to *Chapman* harmless error analysis, and reversed the Washington Supreme Court's holding that *Blakely* violations can never be harmless.[103]

Granted, *Recuenco* does limit *Blakely*'s scope in the federal system by applying harmless-error analysis to its violations. Paradoxically enough, however, it also suggests the possibilities for future *Blakely* expansion.

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[98] Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/the_emshepardem.html (Mar. 7, 2005, 12:11 EST).

[99] I return briefly to the fate of the prior conviction exception *infra* Part IV.B.2.c.

[100] 126 S. Ct. 2546 (2006).

[101] 386 U.S. 18 (1967).

[102] *See* Steven G. Sanders, *Is* Recuenco *Sentencing Case a Big Fat Dud?*, NEW JERSEY LAWYER, Apr. 24, 2006, at 7, *available at* http://njlonline.com/lawmore.LawMore 042406.pdf, at 7 (last visited Oct. 11, 2007).

[103] *Recuenco*, 126 S. Ct. at 2553.

Recuenco included some expansive language about sentencing factors, language that can be read to extend *Blakely* principles.[104]

For example, the *Recuenco* majority, drawing on *Apprendi*, plainly stated that it has "treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt."[105] Thus, instead of narrowing *Apprendi*'s holding (that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"[106]), *Recuenco* contended that all sentencing factors were essentially equal to facts.

Likewise, *Recuenco* specifically discussed *Apprendi*'s recognition that "elements and sentencing factors must be treated the same for Sixth Amendment purposes."[107] Both these assertions questioned how a "sentencing factor" should be defined, leaving plenty of room for *Blakely*'s further expansion—including, for our purposes, an expansion to ancillary sentencing procedures. The *Recuenco* Court's disinclination to limit *Apprendi* only to facts that increase the maximum sentence can be seen as a strong signal that *Blakely*'s extension is not finished.

Moreover, simply because the Court found that constitutional harmless error doctrine is applicable to *Blakely* violations does not preclude individual states from deciding that *Blakely* violations are not harmless under state remedial law. *Recuenco* explicitly acknowledges this possibility in its first footnote, which notes, "Respondent's argument that, as a matter of *state* law, the *Blakely v. Washington* . . . error was not harmless remains open to him on remand."[108]

Put another way, not only did the Court carefully keep open the option of states rejecting harmless error analysis for *Blakely* violations, it also signaled the importance of state law in the post-*Blakely* world.[109] And since the vast bulk of criminal sentencing happens in the states, not the federal system, what may be harmless *Blakely* error under federal constitutional law

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[104] Thanks to Doug Berman for this point. *See* Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/a_few_quick_tho.html (Mar. 7, 2005, 12:11 EST).

[105] *Recuenco*, 126 S. Ct. at 2552.

[106] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[107] *Recuenco*, 126 S. Ct. at 2552.

[108] *Id.* at 2552 n.1.

[109] *See* Steven G. Sanders, *New Jersey Goes Its Own Way*, 182 N.J. L.J. 237 (2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/sanders_njlj_on_errors.pdf.

may still be structural error under state law, again providing a more expansive definition of *Blakely*'s requirements.

3. Cunningham

Most recently, in *Cunningham v. California*, the Court reaffirmed the bright-line rule articulated in *Apprendi* and *Blakely*, rejecting California's attempt to evade *Blakely*'s requirements. The *Cunningham* Court ruled that California's sentencing guidelines were flawed because they required judicial fact-finding to elevate or mitigate a sentence beyond the "middle" range, facts that must be found by a jury to comply with *Blakely* and *Booker*.[110]

The *Cunningham* majority not only clarified that any judicial fact-finding presents constitutional problems, but it also contended that the states which have modified their sentencing systems post-*Blakely* have done so "by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence."[111] In other words, any fact-finding that increases a sentence from the punishment arising from the guilty verdict must be found by the jury and the jury alone. Thus, *Cunningham* is yet another signal from the Court that the goals have widened in the sentencing field.

Analyzing the Court's reasoning in its recent sentencing cases, however, is not the end of the matter. To truly understand the Court's decisions and future direction, it is critical that we derive a coherent sentencing jurisprudence—something that has been sorely lacking, for the most part, in the general scholarly discussion of the *Apprendi-Blakely* case line. Accordingly, Part III of this Article begins an exploration of the jurisprudential currents animating this sentencing revolution, and how these currents should affect our application of the *Blakely* doctrine.

III. RETRIBUTION AND REDISCOVERY OF THE SIXTH AMENDMENT JURY RIGHT

In the past several terms, the Court's decisions on sentencing have been nothing short of revolutionary. Indeed, courts, scholars, and practitioners are just beginning to come to terms with the new requirements for sentencing schemes under *Blakely* and *Booker*.

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[110] *See* Cunningham v. California, 127 S. Ct. 856, 868 (2007).

[111] *Id.* at 871.

One area that has not been much explored, however, is the jurisprudential underpinnings of the Court's recent sentencing decisions. Although there is a general consensus that sentencing jurisprudence has changed, there is little agreement as to how or why.[112]

These underexplored aspects of *Blakely*'s punishment philosophy are extremely important. This is so for two reasons: (1) to help understand how the Court's sentencing jurisprudence has changed; and (2) to assist in predicting in which direction this jurisprudence might ultimately lead.

I contend that the line of late twentieth- and early twenty-first-century sentencing decisions beginning with *Jones* and culminating—for now—with *Blakely*, *Shepard*, *Recuenco*, and *Cunningham*, suggests a new kind of punishment philosophy, one based on historical/doctrinal reasoning and the Court's rediscovery of the Sixth Amendment. Although no one theory fits perfectly, an expressive retributive theory of punishment for sentencing best supports the Court's underlying jurisprudence—one grounded both in the historical jury right to decide all punishments and in community decisions about blameworthiness.

Accordingly, Section A provides a brief overview of the jurisprudence of American sentencing law. Section B explores how the Court's historical grounding of *Blakely* and its rediscovery of the Sixth Amendment jury right supports a modified retributive jurisprudence of sentencing. In short, I hope to show how the Court's new theory of criminal sentencing supports reforming and seriously re-thinking sentencing in general and ancillary sentencing proceedings in particular.

A. *American Sentencing Jurisprudence in Historical Perspective*

Over the past thirty years the philosophy underlying criminal sentencing has been in flux. Although sentencing rules and proceedings have been changing, no coherent belief structure has been articulated, leading to inequity and inconsistency in sentencing procedures. As Doug Berman and Steve Chanenson have argued, "the theories, structures, and procedures for modern sentencing decision-making have not been seriously rethought

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[112] Indeed, in their recent article, Doug Berman and Stephanos Bibas note that "the Court's sentencing jurisprudence is at best confusing, at worst conceptually incoherent." Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 37 (2006).

following the modern rejection of a now seemingly antiquated rehabilitative sentencing philosophy."[113]

The Supreme Court's reasoning in the *Blakely* line of cases, however, suggests a new jurisprudential underpinning to sentencing, one that is based on the Court's reliance and renewed attention to the rights of the jury to determine all facts affecting punishment. But before we explore the new jurisprudence underlying the reasoning in *Blakely* and its predecessors, it is important to understand what sentencing theory we are leaving behind.

Historically, judicial tolerance of relatively informal, non-adversarial sentencing proceedings was grounded on the demands of a discretionary and rehabilitative model of sentencing.[114] The Court's approval of lax procedural rights in a discretionary sentencing system, as articulated in *Williams v. New York*,[115] was expressly premised on the rehabilitative "'medical model' of sentencing that dominated before modern reforms."[116]

By the 1980s, however, the underpinnings of sentencing theory began to change as both state and federal legislatures began to reform their sentencing systems and do away with indeterminacy and discretion.[117] Concern about sentencing arbitrariness and disparity,[118] along with a loss of confidence in correctional rehabilitative programs,[119] motivated much of this change. Instead of a rehabilitative theory of punishment, norms of deterrence and incapacitation became the rule,[120] as well as some consequentialist

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[113] Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-*Blakely *Era*, 4 OHIO ST. J. CRIM. L. 27, 32 (2005).

[114] KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 14 (1973).

[115] Williams v. New York, 337 U.S. 241 (1949).

[116] Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law _and _policy/2005/01/engaging_with_t.html (Jan. 19, 2005, 04:13 EST).

[117] Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1236 (2005).

[118] *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[119] Tonry, *supra* note 117, at 1236.

[120] *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 11 (2003). As I will explain below, however, I disagree with Tonry's assertion that retributive ideals were the underpinnings of the sentencing policy changes of the 1970s and early 80s, as well as his conclusion that retributive theories cannot accommodate the new developments in penal policy. *See* Tonry, *supra* note 117, at 1239, 1262. Moreover, because it is so grounded in the community's decision-making process, an expressive retributive philosophy for sentencing, particularly ancillary sentencing,

"communicative" theories of punishment, which argued that the aim of punishment was to communicate with the offender about her wrongdoing.[121] Such utilitarian norms have held sway until recently.

Once rehabilitation theories of punishment went out of vogue, the *Williams* rationale supporting almost complete judicial and probationary discretion became untenable. The sentencing reform movement rejected rehabilitation as a penal theory because modern sentencing focused predominantly on incarceration and imposing punishment, not on devising a cure.[122] "No one believes anymore that the goal of rehabilitation justifies totally informal fact-finding procedures."[123] As Stephanos Bibas argued:

> [I]t made sense to have a judge/jury allocation of authority, when sentencing was a prospective enterprise of therapeutic assessment . . . [b]ut now that sentencing seems to be primarily a retrospective assignment of blame, the whole reason for having a second sentencing proceeding that is so trial-like, and yet is not a trial, is really being called into question.[124]

Sentencing, then, has become an adversarial process like any other.[125]

There has been little thought about the philosophy that has replaced rehabilitation,[126] however, and that itself is a problem.[127] As Norval Morris observed, "[w]hen a court decides what sentence to impose on a criminal

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avoids Tonry's critique that the retributive punishment theories adopted by "[a] considerable number of serious philosophers" in the 1970s and 80s could not be adopted in the "real world because they were premised on unrealistic and unattainable assumptions about social justice and equal life chances." *Id.* at 1265.

[121] Tonry, *supra* note 117, at 1266.

[122] Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/engaging_with_t.html (Jan. 19, 2005, 04:13 EST).

[123] Harris, *supra* note 91, at 86.

[124] Weisberg, *supra* note 22, at 636–37 (quoting Stephanos Bibas).

[125] Harris, *supra* note 91, at 86.

[126] As Berman aptly notes:

> The sentencing revolution has been theoretically underdeveloped because it largely has been a conceptual anti-movement. Many jurisdictions moved to structured sentencing systems and abolished the institution of parole not in express pursuit of a new sentencing theory, but rather as simply a rejection of the rehabilitative ideal that had been dominant for nearly a century.

Berman, *supra* note 22, at 11.

[127] Following in Bibas's path, I am interested in exploring the substantive values underlying the change in punishment philosophy. *See, e.g.*, Weisberg, *supra* note 22, at 637 (citing Bibas).

standing convicted before it, it must so decide with reference to some purpose or purposes, conscious or unconscious, articulate or inarticulate."[128]

Although rehabilitation is no longer the primary underlying philosophy of sentencing, there have been few comprehensive theories of modern sentencing in its place. I aim to fill this gap. Accordingly, I propose that an expressive retributive theory of punishment best supports the Court's rediscovery of the Sixth Amendment jury right in sentencing procedures.

B. *Expressive Retribution and the Sixth Amendment*

In 2003, prior to *Blakely* but following *Jones*, *Apprendi*, and *Ring*, Alschuler presciently argued that "retribution, a seemingly archaic, backwards-looking goal dismissed by the champions of rehabilitation at one end of the twentieth century and by the champions of 'crime control' at the other, merits recognition as the central purpose of criminal punishment."[129] It is this retributive principle that I wish to develop below, because *Blakely* and its predecessors rely on an unspoken theory of community-based retribution that should inform our future understanding of criminal punishment.

Michael Tonry has observed that penal theory and punishment philosophy can either be dependent or independent variables—"[t]hey may cause changes in the world or result from them."[130] Consequently, we can better understand the origins of punishment ideas, policies, and practices if we become more aware about why and when particular ideas and beliefs become popular.[131] Thus, exploring the *Blakely* rediscovery of the jury right in sentencing proceedings is critical in helping us understand why a retributive theory of sentencing best explains recent sentencing decisions.

Retributive theory is often misunderstood and mischaracterized. Although a retributivist must believe that imposition of deserved punishment is an intrinsic good, that is the only proposition to which she commits; she needn't believe it is the *only* intrinsic good.[132] This view separates the

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[128] Norval R. Morris, *Sentencing Convicted Criminals*, 27 AUSTL. L.J. 186, 189 (1953).

[129] Alschuler, *supra* note 120, at 15.

[130] Tonry, *supra* note 117, at 1233.

[131] *Id.* at 1234.

[132] Alschuler, *supra* note 120, at 15.

retributivist from those who believe punishment is an intrinsic evil, such as Jeremy Bentham.[133]

A retributivist follows in Kant's steps through her focus upon the moral appropriateness of individual punishments in relation to the offender's individual crime.[134] Unlike Kant, however, she need not argue that imposing just punishment is a "categorical imperative";[135] nor parrot Michael Moore that the retributivist punishes solely because the offender deserves it;[136] nor agree with James Stephen that it is morally correct to hate criminals.[137]

Neither must a retributivist stick to the "crude model" of retributive theory that H.L.A. Hart identifies—that the justification for punishing men is so the "return of suffering for moral evil voluntarily done, is itself just or morally good."[138] Instead, a retributivist can accept the goal of imposing the community's sanctions as an intrinsic good that expresses social disapproval, shapes norms, and creates moral education.[139]

Moreover, many retributivists believe in a balancing of burdens as part of society's role in criminal punishment.[140] Alschuler argued that this kind

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[133] Bentham argued that "all punishment in itself is evil . . . . [I]f it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* JEREMY BENTHAM AND JOHN STUART MILL, THE UTILITARIANS 162 (Dolphin 1961).

[134] *See generally* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (1780).

[135] "The Penal Law is a Categorial Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it . . . ." IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (1887).

[136] *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987).

[137] *See* JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (Macmillan 1883).

[138] H.L.A. HART, *Responsibility and Retribution*, *in* PUNISHMENT AND RESPONSIBILITY 210, 231 (1968).

[139] I borrow these ideas from Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997), which argues that there is a great utility in a distribution of liability and punishment according to people's shared intuitions of justice, perhaps greater than the utility of distributing liability and punishment in the traditional utilitarian manner (to optimize deterrence, rehabilitation, or incapacitation).

[140] *See* HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 34 (1976). Morris argues, among other things, that people's "disposition to comply voluntarily will diminish as they learn that others are with impunity renouncing burdens they are assuming."

of consequential argument for retributivism turns on "how a society perceives desert rather than on desert itself."[141]

As this line of thought contends, when there are conflicting perceptions of desert—or moral blameworthiness—democratic processes are most likely to give the best concept of desert for a polity.[142] Concepts of desert that emerge from democratic processes will generally be widely shared or respected.[143] Finally, "recognizing that criminal punishment is not simply an instrumental good discourages unweighted procedural tradeoffs of the sort that have characterized the new penology."[144]

More recently, there has been some argument that retribution may be in ascendance both in academic circles and real-world institutions.[145] In areas such as the "purposes" section of state criminal codes, the distributive standard in modern sentencing guidelines, the revision of the Model Penal Code, and the debate over the death penalty, retributive theory has become a guiding principle.[146]

As H.L.A. Hart argued, "we attach importance to the restrictive principle that only offenders may be punished."[147] The Supreme Court's new sentencing jurisprudence attempts to bolster that statement by ensuring that punishment only goes to those offenders who have been found guilty of any and every offense they have been charged with by a jury. The critical aspect of the jury's role in sentencing reflects the importance the Court has placed on the community—and liberal democratic decision-making—in sentencing procedures.

Moral judgments still justify criminal punishment and sentencing, as "the relative gravity of punishments is to reflect moral gravity of offences."[148] Accordingly, the level of punishment in retributive theory is roughly equal to the seriousness of the wrong and the blameworthiness of the offender in committing it.

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[141] Alschuler, *supra* note 120, at 19.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See* Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical (University of Pennsylvania Public Law & Legal Theory Research Paper Series, Working Paper No. 06-32, 2006), *available at* http://papers.ssrn.com/abstract=924917.

[146] *Id.* at 1.

[147] H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 1, 12 (1968).

[148] HART, *supra* note 138, at 234.

Historically, the jury has determined the blameworthiness of the offender. The Court's decisions endorsing the right to jury decisions is equally an endorsement of the jury's determination of who in society is blameworthy. Thus, retributive justice principles, as applied to sentencing, can be found in the Court's rediscovery and reaffirmation of the right of the jury—that is, the polity—to set out all criminal punishment, no matter what form it may take. This ideal is neither vengeful nor desirous of suffering,[149] but instead allows the community to set out blame for crimes that specifically affect them. We impose community standards of punishment with sadness, not "retributive hatred."[150]

Retribution is not only concerned with the offender's past wrongdoing, of course. "[R]etributivists urge on offenders the maxim that they must take responsibility for the reasonably foreseeable results of their actions."[151] Specifically, as one scholar has argued, when we punish an offender who knows or should have known his actions were illegal, "we tell him that his actions matter to this community constituted by shared laws."[152] This understanding ties neatly into the Court's repeated arguments in its recent sentencing decisions that the jury must make the decisions on almost all facts that affect punishment because only a decision made by a fair cross-section of the community imposes the responsibility of accepting moral blame onto the offender.

When the judge, instead of the jury, is primarily or solely responsible for doling out the moral blame of punishment, offenders may not feel responsible for their actions, because the kind and type of punishment—the sentence—is so far attenuated from the community. When the judge determines sentencing facts, the offender may very well attribute his punishment to the State and shrug off the desired feelings of responsibility or awareness of his wrongdoing. In contrast, when the jury determines sentencing facts, the wrongdoer has more difficulty avoiding the burden of criminal responsibility, because his fellow citizens, his community, and his peers have pronounced his blameworthiness—as signified by the weight and heft of his sentence.

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[149] Extreme versions of retributive theory justify punishment as a moral good in return for the suffering for moral evil voluntarily done. *See id.* at 234–35.

[150] *See* Jeffrie G. Murphy, *Hatred: A Qualified Defense*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 88 (1988).

[151] Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1442–43 (2004).

[152] *Id.* at 1445. Markel posits that retribution instantiates, as a socio-legal practice, an ideal of individual moral accountability in the course of explicating a confrontational conception of retribution. *See id.*

As a distributive principle, retributive justice supports the Court's new sentencing jurisprudence, since every time the offender commits a crime, she undermines the sovereign will of the people by challenging their decision-making structure.[153] Because criminal laws in liberal democracies reflect a democratic pedigree of criminal laws, crimes are expressions of superiority to the state and the community.[154] By involving the will of the people during the sentencing and punishment phase through the incorporation of the jury, the Court helps offset the unfairness the offender created in the community.

In the Court's new allegiance to the criminal jury trial right in sentencing, any imbalance and attack against the will of the people is balanced by the requirement that the jury find all elements of the crimes alleged, thereby deciding on punishment. If retribution communicates directly to offenders,[155] then it is a communication from the community to the wrongdoer.

Retribution can be a rather blunt instrument to indiscriminately apply to all of modern sentencing, however. There have historically been a number of objections to retribution, including its harshness, its preference for prisons, its immorality, its impracticality, and its vagueness, among others.[156] In response, Paul Robinson has recently contended that there are at least three distinct conceptions of desert—vengeful, deontological, and empirical—and an accurate assessment of retribution as a distributive principle requires that each of these concepts be distinguished.[157]

As applied to sentencing reform, Robinson's conception of *empirical* desert proves most useful. Robinson defines empirical retribution as a distributive principle focusing on the blameworthiness of the offender, but assessing punishment based on the community intuitions of justice.[158] The primary source of this principle is derived from empirical research into what drives people's intuitions of blameworthiness.[159]

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[153] *Id.* at 1449. *See also* JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW 124 (1990).

[154] Markel, *supra* note 151, at 1453.

[155] *Id.* at 1465.

[156] Robinson, *supra* note 145, at 4.

[157] *Id.* at 4–5. Robinson defines vengeful desert as requiring that the punishment be proportionate to the harm caused, deontological desert as focused on the blameworthiness of the offender, and empirical desert as focused on the blameworthiness of the offender but relying on the community's intuitions of justice for punishment. *Id.* at 5, 7, 8.

[158] *Id.* at 8.

[159] *Id.*

Notably, however, it is not the community's view of deserved punishment in a specific case that drives empirical retribution, but instead a "set of liability and punishment rules" that applies identically to all defendants.[160] Empirical desert does not seek to explore "true" moral blameworthiness, but instead relies on the community's shared intuitions about assigning blameworthiness.[161]

The benefit of an empirical desert theory is strongest when you look to the practical consequences.[162] As Robinson contends:

> If the criminal law tracks the community's intuitions of justice in assigning liability and punishment . . . the law gains access to the power and efficiency of stigmatization, it avoids the resistance and subversion inspired by an unjust system, it gains compliance by prompting people to defer to it as a moral authority in new or grey areas . . . and it earns the ability to help shape of powerful societal norms.[163]

If the criminal law can only truly shape norms if it commands moral respect,[164] then using empirical desert as a framework for modern sentencing simultaneously pays tribute to the Court's understanding of historical jury rights and the practical implications of locating the arbiters of moral blameworthiness within the offender's community.

Criminal law plays a key role in creating and sustaining the moral consensus needed for maintaining social norms in our diverse society.[165] Thus the jury, as representative of the community, must play a part in all sentencing punishments because this community determination of social

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[160] *Id.* Because empirical desert relies on a general set of community-dictated liability and punishment rules, instead of individual, ad hoc determinations of punishment, this partially responds to the problem of bias when relying on the community to hand down punishment at sentencing. Until quite recently, the American jury was biased against racial and sexual minorities, women, and the foreign-born, and some would argue that the jury is still not free of discriminatory intent. By relying on general community-created rules to impose punishment, however, it becomes harder for any specific jury to impose excess punishment on a particular offender for discriminatory reasons. However, this still does not resolve the problem of immoral intuitions, which needs the impact of deontological desert to ensure true justice. *See id.* at 15.

[161] *Id.* at 11.

[162] Robinson, *supra* note 145, at 11.

[163] *Id.* at 9.

[164] *See* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 838 (2002).

[165] Robinson, *supra* note 145, at 13.

norms "may be the only society-wide mechanism that transcends cultural and ethnic differences."[166]

Combined with this conception of empirical desert, Jean Hampton's understanding of retributive theory provides a strong normative framework that fits the ideals and doctrine of the Court's new sentencing regime. Hampton's "expressive" theory of retribution,[167] which explores the wrongfulness of public conduct and the response that is retribution,[168] posits that although all wrongful actions violate a moral standard, some moral actions violate those standards in a way that also affronts the victim's value or dignity.[169] To say someone has value, Hampton argues, is to invoke certain conceptions of human worth, specifically highlighting an egalitarian theory.[170]

Drawing on a Kantian theory of human value, Hampton finds people's worth related to their very humanity, allowing each person an equal moral worth insofar as each person is an autonomous, rational being.[171] In essence, Hampton posts a "democratic conception of value" to underlie the "moral respect" crucial to her expressive retributive theory.[172]

The "Kantian conception of value,"[173] rooted in Judeo-Christian tradition, has been extremely influential in modern Western societies, thus playing a role in "setting the normative standards for acceptable treatment of

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[166] *Id.*

[167] Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1659 (1992).

[168] *Id.* at 1661, 1665.

[169] *Id.* at 1666.

[170] *Id.* at 1668. Hampton explicates and relies upon Kant's theory of moral worth to base her theory of retribution. *See id.* at 1668–69. A full discussion of Kant and his theory of either retribution or moral theory is well beyond the reach of this paper. As such, I invoke Kant only to explain Hampton's theory, and neither endorse nor disagree with her interpretation.

[171] *Id.* Hampton further maintains that "moral respect is based on our intrinsic value as ends, which all of us have equally . . . . On this view, morality demands of each of us that we respect the dignity of others and of ourselves . . . ." *Id.* at 1668.

[172] *Id.*

[173] Hampton, *supra* note 167, at 1669. As Hampton understands the phrase, it is "a generic term, subsuming a number of different species of theories of value." *Id.* at 1672. As Hampton notes, each of these theories have in common a belief that "human value is intrinsic, equal, and 'permanent' in the sense that our value cannot be degraded or lowered by any kind of action." *Id.* I follow Hampton's general understanding of the phrase, and do not seek to explore here the different meanings of "value" that may exist for individual theorists.

people in our society."[174] This egalitarian theory of moral worth has always been implicit (and sometimes explicit) in American conceptions of the polity and the state.

It is this undercurrent of democracy and egalitarianism that makes Hampton's understanding of retributivism particularly appropriate for a new jurisprudence of sentencing, because the Court so heavy relies upon the democratic principles animating the institution of the criminal jury. Such an egalitarian theory of worth, of course, is a normative theory, a "part of a culture's normative practices, animating its ethics and its punitive system."[175]

As Hampton contends, when we behave in a "wrongful" manner, we are expressly failing to conform to society's understanding of acceptable behavior; either by doing acts that are conventionally seen as wrong, or by expressing defiance of that acceptable behavior.[176] Importantly, "[i]t is because behavior can carry meaning with regard to human value that it can be wrongful."[177] Essentially, a person is "morally injured" when she is targeted by behavior that is interpreted by her cultural community as diminishing her value.[178]

We care about what people say via their actions, good or bad, because we are deeply concerned over whether our intrinsic value, and the intrinsic value of others, will garner society's—and specifically, our community's—respect.[179] When wrongful actions are committed, they not only misrepresent our value and reduce the entitlements which follow from that value, but also "threaten[] to reinforce belief in the wrong theory of value by the community."[180] It makes sense that the imposition of sanctions and moral blame upon the wrongdoer should be imposed by the jury, an egalitarian cross-section of that very same cultural and actual community.

According to our historical ideals of criminal justice and equality, the jury must determine the scope of the punishment to be visited on the offender. It offends our bedrock notions of equality when a wrongdoer, by her actions, represents herself as superior to the rest of the community. This is not because she is a "free rider," and in the words of Herbert Morris, "got

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[174] *Id.* at 1669.

[175] *Id.* at 1667.

[176] *Id.* at 1670.

[177] *Id.*

[178] *Id.*

[179] Hampton, *supra* note 167, at 1678.

[180] *Id.*

something for nothing,"[181] but because she has gotten ahead in ways "inegalitarian and disrespectful" to the community.[182] The jury is the best way to restore corrective fairness and destroy this inegalitarian belief system that, if left intact, would continue to injure the community.

Restoring fairness and equalizing the community are important components of restorative justice, which also plays a part in the community's role as arbiter of punishment. Restorative justice envisions crime as "a violation of people and relationships that creates obligations to make things right."[183] The restorative theory of punishment conceptualizes justice as a process that incorporates both the community and the offender in an attempt to repair and reconcile the harm done.[184]

Although many have characterized restorative and retributive theories of justice as polar opposites, both theories have much in common: "a desire to vindicate by some type of reciprocal action and some type of proportional relationship between the criminal act and the response to it."[185] In fact, an expressive retributive theory of punishment, such as I promote here, borrows from restorative justice in that it is deeply concerned with "the repair of the material and emotional harms"[186] that criminal behavior inflicts. By using the jury as the adjudicator of the harm and determinant of punishment, expressive restorative retribution focuses on the community's role in maintaining the egalitarian nature of our society.

American normative theories of democracy and democratic deliberation have always included the participation of the jury as part of our system of criminal justice. If you accept that conceptions of egalitarian moral worth are part of our culture's normative values,[187] and have therefore set the

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[181] HERBERT MORRIS, *Persons and Punishment*, *in* ON GUILT AND INNOCENCE, ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31–58 (1976).

[182] Hampton, *supra* note 167, at 1681.

[183] David Dolinko, *The Theory and Jurisprudence of Restorative Justice*, 2003 UTAH L. REV. 319, 319 (internal quotation marks omitted).

[184] *See id.* at 319–20.

[185] Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 257 (2005) (discussing Conrad Brunk). Although Brunk argues that the two theories differ in "how to make things right," he envisions retributive justice as primarily focused on imposing pain. *Id.* As I discuss, however, an expressive retributive theory of punishment is primarily focused on equalizing the harm done to the community, rather than simply penalizing the offender.

[186] Dolinko, *supra* note 183, at 338.

[187] Hampton, *supra* note 167, at 1668.

normative standards for acceptable treatment of people in our society,[188] then juries must be part of the determination of punishment because the jury is the most effective tool with which to impose the normative judgment of the community onto the wrongdoers. The "Kantian, egalitarian theory of worth implicit in American political values"[189] is best implemented through the jury, an egalitarian representation of the community and the state.

Even preceding *Blakely*, some scholars argued that, in the absence of wide consensus on sentencing goals, it was best to leave sentencing decisions to a deliberative democratic institution such as the jury.[190] The role of the jury is so important because the use of the jury allows for a greater communal voice in sentencing.[191] Jury involvement in sentencing increases the legitimacy of sentencing punishment because the punishment for each offense is linked directly to the will of the community.[192]

Post-*Blakely*, the Court's interest in, and dedication to, the jury's right to decide all facts that increase punishment is, in certain ways, an expressive approach to the rights and needs of the community; it relies upon the "citizenry's moral representative"[193]—the jury—to express the community's condemnation of the act and re-establish the victim's unfairly reduced value. This is not for purposes of revenge, however, but to restore the victim and the offender to their normal places within the community.

Hampton's theory of expressive retribution fits well with the Court's recent requirement that the jury determine sentencing facts, because only through jury determination of punishment can the original retributive goals of the Framers—apportioning blame and societal punishment—be achieved. Although the Framers disagreed about many things, they concurred with Blackstone's estimation of the criminal jury, which ensured that no one received criminal punishment unless a group of ordinary citizens agreed.[194]

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[188] *Id.*

[189] *Id.* at 1669.

[190] *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003).

[191] *See id.* at 316 (celebrating the "democratic virtues" of jury involvement in sentencing).

[192] *See id.*

[193] Hampton, *supra* note 167, at 1694.

[194] *See* Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 34 (2003). As Barkow notes, "even before the Sixth Amendment guaranteed 'the right to . . . an impartial jury,' the criminal jury was enshrined in the Constitution as a check on the government." *Id.* at 34 (citations omitted).

Ultimately, a framework of expressive restorative retribution encompasses both the historical antecedents of the Sixth Amendment jury right and modern ideals of punishment. Revisiting retributive theory with an open eye to its contours can "show that it is bound up with our best understanding of how individuals and communities live well together."[195] Despite the arguments of critics over the years, retributive theory has a liberal democratic nature.[196] As such, it is the best suited to explain, on a more philosophical level, the Court's recent sentencing reforms.

IV. ANCILLARY SENTENCING IN *BLAKELY*'S WAKE

The link between expressive retribution and ancillary sentencing is not obvious, and punishment theory has been used infrequently in the under-conceptualized area of sentencing. When expressive restorative retribution is applied to ancillary sentencing proceedings, however, the framework permits the community, via the jury, to hand down punishment and moral opprobrium to their fellow citizens.

Not only does expressive empirical retribution give the community a voice and help foster egalitarian and democratic ideals, it also forces offenders to take more responsibility for their wrongdoings, since the community is involved in the imposition of punishment and restoring the balance disturbed by the offender's bad acts. This type of community involvement is the much-needed step that has long been missing from our post-prison punishments.

A. *Reribution as a Guidepost for Ancillary Sentencing*

With the benefit of hindsight, it is clear that utilitarian theories of jurisprudence for sentencing offenders were unsuccessful, particularly when it came to such hidden sentences as parole, probation, and post-release supervision. Rehabilitation, deterrence, and incapacitation all failed in their individual ways. Rehabilitation's loose procedural standards left too much arbitrary discretion at the hands of judges and correction officials. Neither deterrence nor incapacitation has done much to help fix the problem of recidivism, despite the complicated supervisory periods tacked on to most offenders' sentences.

With expressive restorative retribution as a philosophy of punishment, however, a concrete policy of community involvement and participation can

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[195] Markel, *supra* note 151, at 1430.

[196] *Id.* at 1431.

help structure ancillary sentencing, giving guidance to not only the players in the criminal justice system, but hopefully the legislative and executive branches as well.

There is a strong need for community sanctions, involvement, and support for any sort of post- or out-of-prison punishment to properly work. If such punishments were grounded in the community—if released offenders had to serve their parole or post-release supervision in the very community they had harmed—it is possible that they would feel more culpability for their transgressions. Moreover, the community itself would be able to feel restored to its original state through the visible imposition of punishment on wrongdoers who had injured it. Finally, community sanctions provide a measure of restorative justice for both the victims and the community. In that way, parole, probation and post-release supervision can all be seen as critical parts of expressive retributive philosophy translated into the real world.

There are a variety of ways that expressive restorative retribution could be incorporated into ancillary sentencing proceedings. For example, in pre-sentence proceedings, such as pre-sentence reports and persistent violent felony offender statutes, the community could be directly involved in deciding which facts should be relevant to increase sentences—that is, which facts are so problematic to the offender's society that it is necessary to impose extra punishment on her. Likewise, with post-prison ancillary sentences, such as parole, post-release supervision, and restitution, the community could become directly involved in determining what local aspects of punishment should be imposed, whether community service, time in a local half-way house, drug and alcohol abuse counseling, or the like.

For example, Jeremy Travis has proposed drawing heavily on the resources of the community, including families, local employers, and churches, to help better integrate the community into ancillary sentencing proceedings.[197] Travis suggests creating an entity to oversee all community supervision in each area.

> [The entity] would act on behalf of the criminal justice system . . . . [It would] oversee the transition period of returning prisoners . . . . [And it would] leverage the assets and risks of the community, acting in a problem-solving mode to achieve the outcomes of adherence to conditions of supervision, crime prevention generally, and reintegration of offenders, particularly those returning from prison.[198]

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[197] Jeremy Travis, Senior Fellow, The Urban Institute, Thoughts on the Future of Parole 12 (May 22, 2002), *available at* http://www.urban.org/UploadedPDF/410521.pdf.

[198] *Id.* at 11.

The entity's officials would live and work in the community to avoid the common problem of distance and attenuation. This could be an ancillary sentencing version of the community policing model, which would involve the community in concrete problem-solving activities to help re-integrate offenders back into society.

Similarly, a specific transition team could be created for each supervised releasee. As explained by the Re-Entry Policy Council, "[t]ransition planning team members will vary, depending on the situation of the person approaching release, but could include representatives of the institution, community corrections, human service agencies, community-based services, housing providers, local law enforcement, and the court system—in addition to advocates for the victim and family members."[199] New York, Missouri, Tennessee, Florida, and Maryland are among the states that currently have a community transition team in place for offenders with ancillary sentences.[200]

Another possibility involving the community in ancillary sentencing proceedings is faith-based programming. For example, the Ohio Department on Rehabilitation and Corrections has recently begun to investigate the possibility of using pastoral community members to work with those offenders on supervised release.[201] Although using faith-based community initiatives must be carefully squared with First Amendment requirements, it also permits societal input into ancillary sentencing.

Because it is the local community that interacts with the offender on the most frequent basis, under a theory of expressive retribution, it is important to get the community's imprimatur on the length and heft of any ancillary punishments. The community's role in imposing punishment cannot end at the courthouse steps.

There is tremendous potential in applying the lessons of expressive retribution to the world of ancillary sentencing. There are a variety of ways in which the community can become more involved with punishment of released offenders, and ancillary sentencing proceedings offer us a wealth of possibilities. If we accept that our system of incarceration and punishment is deeply flawed when it comes to preventing recidivism,[202] then we should be

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[199] REENTRY POLICY COUNCIL, REPORT OF THE RE-ENTRY POLICY COUNCIL 346 (2003), *available at* www.reentrypolicy.org/reentry/Report/Download

[200] *Id.* at 360–64, 389.

[201] Thanks to Doug Berman for pointing this out.

[202] *See* JEREMY TRAVIS, URBAN INSTITUTE, BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA (2002), http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf; Amy Solomon, *Does Parole Supervision Work?*, URBAN

willing to extend the philosophy of expressive retribution from these pages to the streets. *Blakely* has given us the tools to do so.

Following *Blakely*, our neglect of ancillary sentencing proceedings may finally end. It is long past time that the criminal procedure revolution that so galvanized the adjudication stage of the criminal trial now be applied to all aspects of criminal sentencing. Broadening the reach of *Blakely* to include ancillary sentencing is one way to do so.

B. *Ancillary Sentencing in Theory and Practice*

If sentencing has generally been relegated to the bottom of criminal scholarship, ancillary sentencing proceedings have been almost entirely ignored. As Kate Stith and Jose Cabranes have observed: "[e]verything else that might relate to just punishment—the character, history, and motivation of the offender, the particular circumstances of the crime, relevant social and culture needs—has been relegated to sentencing, the back-end of the criminal justice process."[203]

American sentencing itself encompasses a variety of punishments. The "muddy and complicated realities of multi-actor sentencing systems"[204] include the length of incarceration, prison selection, in-prison punishments, post-release supervision, community service, rehabilitative programming, reports on the offender before sentencing, and restitution. Sometimes they are determined by the court, sometimes the state legislatures, sometimes the parole board or department of corrections.[205]

What all of these proceedings have in common is the potential to enhance an offender's sentence and a lack of jury input, the only body constitutionally permitted to increase an offender's punishment. Therefore, many of these ancillary sentencing procedures may violate the animating principles of *Blakely*.

INSTITUTE, Spring 2006, http://www.urban.org/UploadedPDF/1000908_parole_supervision.pdf.

[203] STITH & CABRANES, *supra* note 114, at 22.

[204] Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL'Y 389, 393 (1998).

[205] *See, e.g.*, Jon Wool, *Aggravated Sentencing: Blakely v. Washington, Legal Considerations for State Sentencing Systems*, 17 FED. SENT'G REP. 134 (2004).

The *Blakely* majority viewed its decision as "a ringing defense of our adversarial system of justice and the jury's populist role,"[206] ensuring that sentencing was rooted in a community judgment of blame and stigma, while requiring rigorous procedural fairness to link punishment to each element of the crime.[207] Stated differently, *Blakely* found that before the community can brand someone as a specific kind of criminal offender, the jury must authorize the particular punishment for each and every element of the crime.[208] Applying this reasoning to ancillary sentencing, there are more than a few procedures that become, at minimum, questionable.

Accordingly, below I explore the effect of *Blakely* on a range of front- and back-end sentencing procedures, beginning with pre-sentencing proceedings and ending with post-release supervision. I include six types of proceedings: (1) pre-sentence reports;[209] (2) persistent felony offender enhancement schemes;[210] (3) probation; (4) parole; (5) post-release supervision; and (6) restitution.[211] As a general rule, none of the facts determined in these ancillary sentencing proceedings are proven to the jury beyond a reasonable doubt. In fact, most of the time these facts are not even determined by courts, but instead by "a veritable parade of actors, including . . . police officers, prosecutors, . . . trial judges,"[212] parole officers, department of corrections officials and probation departments. "All of these people guide and constrain the sentencing process."[213]

Additionally, many of these proceedings have minimal procedural due process,[214] often making them arbitrary and hard to appeal. In fact, because guilty pleas comprise 95% of all criminal adjudications, often the sentencing

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[206] Stephanos Bibas, *The* Blakely *Earthquake Exposes the Procedure/Substance Fault Line* 1 (University of Iowa Legal Studies, Research Paper No. 05-01, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id-650861.

[207] *Id.*

[208] *Id.*

[209] Pre-sentencing reports are usually created by the probation department or department of corrections.

[210] *See* N.Y. PENAL LAW § 70.10 (McKinney 2004 & Supp. 2007).

[211] I focus on these six punishments because they are most common among the fifty states, and because they have the greatest impact on convicted offenders both in and out of prison.

[212] Steven L. Chanenson, *Guidance From Above and Beyond*, 58 STAN. L. REV. 175, 175 (2005).

[213] *Id.*

[214] Although the due process requirements for post-*Blakely* sentencing are still an open question, it is outside the scope of this Article.

proceedings are the only "trial-like" procedures that an offender experiences.[215]

My conclusions stem in part from ancillary sentencing data collected from ten representative states: California, Connecticut, Florida, Illinois, Massachusetts, New York, Oregon, Texas, Virginia, and Washington. Where I discuss a particular state's statutes or rules for an example, I cite the specific statute for easier reference. I rely on this data in part to better explain what procedures I am discussing, and in part to get a sense of how states differ in their treatment of convicted offenders, both before and after the verdict, and how full implementation of *Blakely*'s mandate might change these proceedings. My purpose is not to single out one or more states for either good or bad practices. Instead, I hope to give specific examples of why integrating *Blakely*'s dictates into these hidden state sentencing proceedings is necessary.

Although considerable effort and ink has been expended on *Booker* and the fate of the federal guidelines, much less attention has been paid to *Blakely*'s effect on state sentencing regimes.[216] This disregard of state sentencing is unfortunate, because not only does *Blakely* itself concern state law, but its particular focus on state implications and lessons is vital.[217]

1. *A Brief History of Ancillary Sentencing*

Many ancillary sentencing proceedings came into being haphazardly. Although they can greatly affect the offender's sentence and punishment, they have too often been part of the hidden costs of sentencing. Therefore, before exploring how *Blakely*'s principles might apply to these procedures, we should review the history of ancillary sentencing proceedings and policy.

The American penitentiary system began to take shape in the mid-eighteenth century, continuing its transformation throughout the nineteenth

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[215] Berman & Bibas, *supra* note 5, at 49.

[216] Some notable exceptions to this rule exist, however. *See, e.g.*, Berman & Bibas, *Making Sentencing Sensible*, *supra* note 5; Berman, *Conceptualizing* Blakely, *supra* note 18; Douglas A. Berman, *Beyond* Blakely *and* Booker*: Pondering Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005); Berman & Chanenson, *The Real (Sentencing) World*, *supra* note 113; Chanenson, *Guidance From Above and Beyond*, *supra* note 212; Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377 (2005); Harris, *supra* note 91; J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After* Blakely, 2006 U. ILL. L. REV. 301; Kevin Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005); Wool, *supra* note 205.

[217] Weisberg, *supra* note 22, at 634.

century.[218] Benjamin Franklin and the Quakers originally conceived of the penitentiary as a place to literally do (solitary) penance. Most prisons, however, were not significantly affected by the nineteenth-century reformatory movement, and remained dark, dangerous and dirty places.[219]

At the end of the nineteenth century, parole boards were created to provide expert advice to sentencing and corrections decisionmakers.[220] Guidelines for parole arrived when the administrative state moved to more bureaucratic law-making.[221] Finally, the corrections world developed further with the creation of sentencing commissions and sentencing guidelines.[222]

Judicial discretion in sentencing really only came into being with the nineteenth-century introduction of indeterminate sentencing systems.[223] Under these systems, courts could impose sentences as they wished, within wide statutory ranges of time, considering all sorts of information, and unimpeded by procedural or evidentiary limitations.[224] In short, with such free-ranging judicial discretion, criminal sentences became almost entirely un-reviewable. Not only did appellate courts lack general authority over sentences, but a sentencing order also typically contained no findings of fact and no rulings of law to review.[225]

At the same time, conditional release from prison—or parole—became a critical part of indeterminate sentencing.[226] Probation also became an "essential component" of the wide discretion given to criminal justice officials.[227]

Both practices had their problems: "probation became more of a supplement to incarceration than an alternative to it," and parole procedures were "arbitrary to a fault."[228] Supervision on either parole or probation was

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[218] *See* Matthew Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839 (1999).

[219] Edgardo Rotman, *The Failure of Reform*, *in* THE OXFORD HISTORY OF THE PRISON 175 (Norval Morris & David Rottman eds., 1995).

[220] *See* Weisberg, *supra* note 22, at 634 (citing Jonathan Wroblewski); Rotman, *supra* note 219, at 182.

[221] Weisberg, *supra* note 22, at 634 (citing Jonathan Wroblewski).

[222] *Id.*

[223] Harris, *supra* note 91, at 4.

[224] *Id.*

[225] *Id.*

[226] Rotman, *supra* note 219, at 182.

[227] *Id.*

[228] *Id.*

minimal, as untrained officers with heavy caseloads were unable to assist or follow up on released prisoners.[229] The officers did, however, have power to revoke probation or parole without a trial or much due process.[230] Thus, from its very beginning, there was little oversight of ancillary sentencing procedures.

For example, in 1881, one of the earliest general indeterminate sentencing and parole laws was passed in New York.[231] In it, courts did not fix or limit the duration of a sentence once a defendant was convicted of a crime.[232] Instead, the "managers of the reformatory" had complete control of the duration of every term within the limitation of the maximum statutory term for the convicted crime.[233] Likewise, Massachusetts established the nation's first probation law in 1878.[234]

There was no central state authority controlling or directing prisons, however. Even the few states that had boards and agencies to issue recommendations made them "little more than advisory," with no power to enforce their decrees.[235]

Other states also adopted systems that provided for indeterminate terms of imprisonment for crimes, set by either the legislature or the courts, and established the first parole authorities.[236] In 1907, New York became the first state to formally adopt all of the components of a parole system, which included "indeterminate sentences, a system for granting release, post release supervision, and specific criteria for parole revocation."[237] Both indeterminate sentencing and parole became common in the states.[238]

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[229] *Id.*

[230] *Id.*

[231] STITH & CABRANES, *supra* note 114, at 18.

[232] *Id.*

[233] *Id.*

[234] Daniel Macallair, *The History of the Presentence Investigation Report*, CENTER ON JUVENILE AND CRIMINAL JUSTICE, www.cjcj.org/pubs/psi/psireport.html (last visited Oct. 30, 2007).

[235] Rotman, *supra* note 219, at 171.

[236] STITH & CABRANES, *supra* note 114, at 18.

[237] JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 58 (2003).

[238] *Id.*

Parole was strongly linked to rehabilitative philosophy.[239] Parole was seen as "providing a structured transition between the tight confines of prison and life without restrictions in the open community . . . . [O]fficers supervised parolees and provided guidance and rehabilitative services."[240] By 1942, all of the states had parole systems in place.[241]

Federal prisons officially emerged in the last decade of the nineteenth-century.[242] Leavenworth was the first federal prison to be built, with construction beginning in 1897.[243] Likewise, Congress established an official system of federal parole in 1910.[244] The introduction of parole had the significant effect of reducing federal judicial authority over the length of prison sentences because "parole authorities, not judges, would determine each federal prisoner's actual release date."[245]

Starting in 1925, a federal judge could also place defendants on probation.[246] If a convicted federal defendant violated probation, the court could order him confined for up to the maximum term of his suspended sentence.[247] Once imprisoned, the convicted federal defendant was at the mercy of the parole commissioners, who served fixed terms.[248] Thus, as sentencing and post-sentencing procedures moved away from the jury and towards either courts or parole boards, there was little oversight or due process—something still true in today's ancillary sentencing proceedings.

At the turn of the twentieth century, then, there was still no substantive law of sentencing, and a "frankly therapeutic model was in effect."[249] This sentencing freedom went hand in hand with the abolition of jury sentencing; "many states that had relied on jury sentencing also abolished or sharply curtailed this practice."[250]

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[239] Thomas J. Bamonte, *The Viability of* Morrisey v. Brewer *and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U. L.J. 121, 125 (1993).

[240] *Id.*

[241] PETERSILIA, *supra* note 237, at 58.

[242] Rotman, *supra* note 219, at 186.

[243] *Id.*

[244] STITH & CABRANES, *supra* note 114, at 18.

[245] *Id.* at 19.

[246] Macallair, *supra* note 234.

[247] STITH & CABRANES, *supra* note 114, at 19.

[248] *Id.* at 19–20.

[249] Rotman, *supra* note 219, at 169.

[250] STITH & CABRANES, *supra* note 114, at 18.

The early parts of the twentieth century also saw the birth of the pre-sentence report (PSR), "[c]onsidered among the most important documents in the criminal justice field."[251] The initial purpose of the PSR was to give the court comprehensive information on the defendant's personal history and criminal conduct so as to better facilitate individualized sentencing.[252] Giving the court the offender's history, the theory went, would permit judges to tailor sentences to the offender's rehabilitative and reintegrative needs.[253] As such, the PSR usually contained a summary of the offense, the offender's role, prior criminal justice involvement, and a social history "with an emphasis on family history, employment, education, physical and mental health, financial condition and future prospects."[254]

Rehabilitation held sway until the early 1970s, when the theory rapidly fell out of favor.[255] In the beginning of that decade, indeterminate sentencing was extremely prevalent,[256] statutes rarely did more than define crimes and set maximum penalties,[257] mandatory penalties were minimal,[258] prosecutors had great charging and plea-bargaining power,[259] judges had immense discretion in setting sentences,[260] and parole boards had essentially unchallenged authority.[261] These punishment practices reflected a utilitarian, rehabilitative theory of sentencing, an underlying belief system then widely shared by jurists, practitioners, and academics. [262]

Although there is no one definitive reason for rehabilitation's decline, there are some factors that helped lead the way to less discretionary sentencing systems. Some of the reasons for rehabilitation's decline in

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[251] Macallair, *supra* note 234.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *But see* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951 (2005) (arguing that rehabilitative goals remain vibrant in many juvenile courts).

[256] Tonry, *supra* note 117, at 1234.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *See, e.g.*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 552 (1978).

popularity can be traced to studies showing poor results from rehabilitative efforts already in place.[263] These studies undermined correctional rehabilitative programs on both ethical and empirical grounds.[264]

Such empirical "proof" of rehabilitation's failure, combined with Marvin Frankel's highly influential book, *Criminal Sentencing: Law without Order*,[265] created a climate in which the absolute discretion of the judge and the corrections official began to seem suspect. In particular, Frankel's book highlighted and consolidated a growing concern over arbitrariness and disparity in sentencing.[266] As Norval Morris noted as early as 1953:

> [W]ithin this wide discretion left to the courts to determine the appropriate punishment for crime they have failed to develop any agreed principles or practices and . . . consequently judicial sentencing lacks uniformity and equality of application, is considerably capricious, and can be shown to fit neither the crime nor the criminal.[267]

Both philosophy and policy began to change accordingly.

As a result, guidelines were introduced for sentencing, parole, charging, and bargaining, mandatory minimum sentences were reintroduced, discretionary parole release was limited, and even some plea bargaining was abolished.[268] Meanwhile, concerned about the unpredictable, disparate sentencing created by wholly discretionary sentencing systems, many reformers advocated getting rid of the then-current sentencing model in favor of more formalized guidelines.[269] In the late 1970s and early 1980s, a majority of state legislatures passed sentencing guidelines limiting judicial and correctional facility discretion.[270]

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[263] *See, e.g.*, ROBERT MARTINSON, WHAT WORKS—QUESTIONS AND ANSWERS ABOUT PRISON REFORM 23–24 (1974).

[264] Tonry, *supra* note 117, at 1236.

[265] MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[266] *See generally id.*

[267] Morris, *supra* note 128, at 186.

[268] Tonry, *supra* note 117, at 1235.

[269] Berman, *supra* note 10, at 7.

[270] For example, Florida's sentencing guidelines first became effective in 1983. *See* FLA. JUR. 2d § 2270. The Maryland guidelines became effective in 1981. *See* Richard Frase, *Sentencing Guidelines in Minnesota, Other Statutes and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69 (1999). The Michigan guidelines became effective in 1983. *See* Sheila R. Deming, *Michigan's Sentencing Guidelines*, 79 MICH. B. J. 652 (2000). Oregon's sentencing guidelines became effective in 1989. *See* OR. REV. STAT. § 138.33 (2005).

The fate of federal courts in the 1970s and early 1980s paralleled that of the states. In 1984, Congress passed the Sentencing Reform Act, which created the U.S. Sentencing Commission.[271] In 1987, the Federal Sentencing Guidelines were born, and reigned supreme until *Booker* made them advisory. Federal parole was abolished entirely in 1987.[272]

Likewise, the pre-sentence report (PSR) underwent a major transformation.[273] The primary role of the probation officer in preparing the PSR became determining any mitigating or aggravating circumstances that might apply to the crime—a switch from offender-based PSRs to offense-based PSRs that are much less concerned with the offender's personal background.[274] This switch reflects the larger shift in criminal sentencing from rehabilitative goals to those of deterrence.[275]

Unsurprisingly, America's prison, parole, and probation populations have had an unprecedented expansion.[276] More than two million Americans live behind bars, and many millions more are on parole or probation.[277] Although state parole has been cut back as determinate sentencing has become more popular,[278] many states still use early release to reward prisoners for good behavior. Additionally, mandatory post-release supervision, a required term of supervision imposed on offenders convicted of committing violent felonies, has recently become popular.

As ancillary sentencing has developed over the past century, it has gone in a variety of directions, often haphazardly, with differing degrees of success in reforming, housing, and punishing convicted offenders. As Kevin Reitz has argued, a "regrettable effect of the hands-off approach is that there has been no meaningful constitutional brake on the nation's thirty-year revolution in the use of prisons, jails, and community sanctions."[279] With its

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[271] Berman, *supra* note 10, at 7. For more on the history of the sentencing guidelines, see Frase, *supra* note 270.

[272] STITH & CABRANES, *supra* note 114, at 20 n.79.

[273] Macallair, *supra* note 234.

[274] *Id.*

[275] Curtis Blakely & Vie Bumphus, *American Criminal Justice Philosophy*, 63 FED. PROBATION 62, 64. *But see* Filler & Smith, *supra* note 255.

[276] MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 8 (NYU Press 1995).

[277] *Id.* at 8, 19.

[278] *See* KEVIN REITZ, AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING REPORT TO THE COUNCIL 16 (2004), http://sentencing.typepad.com/sentencing_law_and_policy/files/mpc_report_to_the_council_2004_for_blog.doc.

[279] Reitz, *supra* note 216, at 1084.

spotlight on all forms of punishment, however, *Blakely* has offered us a chance to re-evaluate these procedures through the lens of the Sixth Amendment historical jury right.

2. *Front-End Sentencing:* Blakely *& Pre-Sentencing Procedures*[280]

Although one or two of the proceedings discussed in this section are not so much "front-end" (that is, before the sentencing hearing) than midway (during the hearing itself), most take place before the official sentencing hearing actually occurs. These proceedings include PSRs, persistent felony offender statutes, prior convictions, and probation (or suspended sentences). I examine each in turn. All of these procedures are arguably affected by *Blakely*.

a. *Pre-Sentence Reports*

Although a common part of virtually every state sentencing scheme, the pre-sentence report contains non-jury decision-making antithetical to *Blakely*'s requirements. It is instructive, then, to parse out what parts of the PSR may not comport with *Blakely*'s requirement that juries find all facts that increase an offender's punishment.

A PSR is assembled by a bureaucratic agency, usually the probation division or the state department of corrections, for the use of the trial court at the sentencing hearing.[281] The PSR normally contains facts about the offense (both from the police report and those presented at trial), information on recidivism, victim impact statements, the offender's prior family history, employment, education, physical and mental health, financial condition, future prospects, and a prognosis of rehabilitative promise.[282]

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[280] In states with indeterminate sentencing systems—where sentences must range between a minimum and a maximum sentence—*Blakely* may also come into play. For more on indeterminate sentencing and *Blakely*, see John Wool & Don Stemen, *Aggravated Sentencing: Practical Implications for State Sentencing Systems*, 17 FED. SENT'G REP. 60, 61 (2004).

[281] *See* Macallair, *supra* note 234.

[282] *See, e.g.*, N.Y. CRIM. PROC. § 390.30(1) (McKinney 2005):

> The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and . . . social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation

These facts and assertions, usually determined by the probation or corrections officer, are utilized by the court to aggravate or mitigate the punishment.[283] Additionally, the facts set down in the PSR often influence the court's statements at the sentencing hearing, statements that affect the determination of an offender's discretionary release date.

The original purpose of the PSR was to "provide information to the court on the defendant's personal history and criminal conduct in order to promote individualized sentencing."[284] In recent decades, however, the PSR has become much more focused on offense characteristics over offender characteristics, [285] with the exception of the oft-misused offender prognosis. The probation department's creation of PSRs and the trial court's use of them can have a large impact on the ultimate length and severity of a prison term. These determinations of fact, which usually include an interview of the defendant, a summary of his or future prospects and employability, and a recommendation for leniency or harshness, are often hastily done with little oversight from the defense bar or the courts. As has been observed about the federal sentencing guidelines:

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deems relevant to the question of sentence, and must include any matter the court directs to be included.

Id.; MINN. STAT. § 609.115 (2003):

> [T]he court shall, before sentence is imposed, cause a presentence investigation and written report to be made to the court concerning the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community.

Id.; VA. CODE ANN. § 16.1-237(A) (2003) (probation officer shall investigate all cases referred to him by trial court and shall render reports of investigation); WASH. REV. CODE ANN. § 9.95.200 (West 2000) (secretary of corrections or secretary's officers may investigate and report to court circumstances surrounding the crime and concerning defendant, defendant's prior record, and family surroundings and environment).

283 *See, e.g.*, CAL. PENAL CODE § 1203(b)(1) (West 2004). The statute provides:

> [I]f a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.

Id.

284 Macallair, *supra* note 234.

285 *Id.*

> Without regard to the rules of evidence, without regard to the standard of proof beyond a reasonable doubt, and without regard to other due process limitations, the sentencing authority [can] consider any information that might shed light on the crime the defendant had committed, other crimes he had committed, or other aspects of his life choices and character.[286]

Regrettably, this statement proves true for state PSRs as well.

Defendants have few rights when it comes to their PSR. Although most states permit the defendant to review the report's content, there is little recourse for any inaccuracies. The burden is on the defendant to prove any error is harmful.[287] Moreover, in *Gregg v. United States*,[288] the Supreme Court held that PSRs have "no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged."[289]

PSRs can range in content from simply noting the fact of a prior conviction (still constitutional under *Almendarez-Torres*) to complicated documents going well beyond. California law, for example, has several recidivist factors memorialized in the PSR that can increase sentences. A California offender's PSR may include the offender's poor performance on a previous term of parole, something itself determined by a parole officer, a purely bureaucratic functionary.[290]

Likewise, in cases eligible for probation, a California offender has her fitness evaluated by a probation officer, who investigates "the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment."[291] The probation officer must make a written report of his findings to the court, "including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted."[292] These negative recommendations and non-jury determinations are particularly damaging because courts tend to rely heavily on the recommendations of the PSR, rarely challenging the findings within. This practice leaves some very

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286 STITH & CABRANES, *supra* note 114, at 28.

287 Macallair, *supra* note 234.

288 394 U.S. 489 (1969).

289 *Gregg*, 394 U.S. at 492.

290 *See* CAL. PENAL CODE § 1203(b)(2)(A) (West 2004).

291 CAL. PENAL CODE § 1203(b)(1) (West 2004).

292 CAL. PENAL CODE § 1203(b)(2)(A) (West 2004). The probation officer must also include recommendations on the restitution amount. § 1203(b)(2)(D)(i).

influential fact determinations to an unelected functionary of a bureaucratic institution.[293]

Jones itself illustrated how recommendations in PSRs can ultimately end up violating an offender's right to have a jury determination of all key facts. In *Jones*, the PSR recommended that the defendant be sentenced to twenty-five years for the carjacking because one of the victims had suffered serious bodily injury; the recommended punishment was duly imposed.[294] *Jones*, however, overturned the underlying conviction because the crime of inflicting serious bodily injury should have rightfully been classified as an offense element, to be determined by the jury, not a sentencing enhancement to be determined by the court.[295] In other words, *Jones* teaches that a factor in a PSR becomes an element of a crime when it "not only provide[s] for steeply higher penalties, but condition[s] them on further facts (injury, death) that seem quite as important as the elements" either in the original indictment or statute.[296]

Similarly, many facts in the PSR are left to the probation officer's investigation and determination. Just as *Jones* found that a sentencing enhancement should not be mentioned in the PSR and left to the court, applying *Blakely*'s mandate makes suspect many of the other facts in a PSR. The principles underlying *Jones* and *Blakely* strongly suggest that certain aspects of the PSR may no longer pass constitutional muster.

Few state courts have addressed whether PSRs come within *Blakely*'s reach, and those that have are in disagreement over whether *Blakely* applies. In *Dickenson v. State*,[297] an Indiana appellate court held that *Blakely* did not apply to the state's system of compiling PSRs, because the trial court gave the defendant the opportunity to review and object to the contents of the report.[298] In *People v. Isaacks*,[299] however, the Supreme Court of Colorado

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[293] In Illinois, however, the probation services department is quasi-judicial: the chief judge of each circuit must provide full-time probation services for all counties within the circuit, and appoints the chief probation officer and all other probation officers from lists of qualified applicants supplied by the Supreme Court. *See* 730 ILL. COMP. STAT. 110/15(2)(a)–(b) (2006).

[294] Jones v. United States, 526 U.S. 227, 231 (1999).

[295] *Id.* at 235.

[296] *Id.* at 233. A sentencing factor in a PSR also becomes an offense element where it has elsewhere been treated as defining an offense element. *Id.* at 235.

[297] 835 N.E.2d 542 (Ind. Ct. App. 2005).

[298] *Id.* at 554–55. In Indiana, failure to object to the contents of the PSR waives any issue with its use in enhancing a sentence. *See id.*

[299] 133 P.3d 1190 (Colo. 2006).

held that after *Blakely*, the trial court could not enhance an offender's sentence based on contested assertions in the PSR.[300] The *Isaacks* court, concerned with the defendant's Sixth Amendment jury right, found that *Blakely* did not permit sentencing courts to use facts admitted by the defendant unless there was a knowing and voluntary waiver of these rights[301] regardless of whether the admissions were in a police report or, as here, in the PSR. Critically, the Colorado Supreme Court interpreted *Blakely* as "extend[ing] to all facts that are not reflected in a jury verdict or, in the case of a plea bargain, to all facts beyond those that establish the elements of the charged offense."[302]

Likewise, in a 2005 unpublished opinion, the Tennessee Court of Criminal Appeals found that "the portion of the presentence report relating to the defendant's admission of prior drug use [did] not contain sufficient guarantees of trustworthiness to justify application of [sentence enhancement guidelines] for prior criminal history without offending *Blakely*."[303] Such concern about the defendant's full right to a jury trial should serve as exemplar for future state court decisions.

It can be argued that a narrower understanding of *Blakely* does not require juries to find every fact that may increase an offender's sentence, particularly when such facts do not comprise any part of the offense element, such as in the PSR. This argument works on two levels. First, on a basic historical level, American courts in the constitutional era dealt with few felonies, let alone the wide array of pre- and post-sentencing procedures that we have today. As this argument goes, the Founders never dreamed of applying the Sixth Amendment right to facts not constituting part of the offense elements. Therefore, since *Blakely* depends on a doctrinal/historical view of the Sixth Amendment, any sentencing proceeding that did not exist during the constitutional period need not meet *Blakely*'s strictures.

This type of historical argument, however, can be defeated by reviewing the constitutional requirements in other criminal law contexts, many of which also did not exist during the Founders' era. We apply constitutional protections to a variety of procedures unheard of in the late-eighteenth century, including police infrared searches, car stops, and *Miranda* rights, to

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[300] *See id.* at 1192. Specifically, defendant contested the PSR assertions that he had admitted his removal from a treatment program due to violence, and that he was resistant to treatment. *Id.* at 1191.

[301] *See id.* at 1192.

[302] *Id.* at 1193.

[303] State v. Torres, No. M2004-00559-CCA-R3-CD, 2005 WL 292431, at *8 (Tenn. Crim. App. Feb. 4, 2005).

name a few. So, the fact that the PSR is a twentieth-century sentencing tool cannot help in avoiding application of *Blakely* principles.

A second, more practical argument contends that the facts set out in PSRs could be seen as *minor* facts, ones that do not truly require determination by the jury. This understanding of *Blakely* argues that the offender's personal and correctional history (including unproven charges), the description of the crime (using facts from both the police report and the trial), and prognosis of rehabilitative promise are insufficiently important to truly merit the full panoply of Sixth Amendment jury rights.

What this sort of argument fails to consider, however, is the critical importance of these offender-based characteristics and offense-based facts in potentially increasing an offender's punishment. For example, PSRs commonly include statements about the crime from the police report, some of which have never been admitted into evidence, some of which are pure hearsay, and none of which have been presented to the jury. Allowing the court to determine the reliability and impact of these facts on an offender's punishment seems a simple end-run around the Sixth Amendment jury right.

Similarly, the descriptions of the offender's personal and correctional history can be equally unreliable. Although prior convictions are still acceptable terms upon which to increase a sentence, often the PSR contains information about prior arrests and even indictments that were dismissed, information that can negatively influence the court's determination of punishment. Additionally, in cases where the jury finds that certain offenses were not proven, the court may still take the facts of those offenses—often listed in the PSR—into account. In other words, an offender can be punished for crimes that were never proven beyond a reasonable doubt, surely a violation of constitutional proportions.

Moreover, the statements made about an offender's correctional history and rehabilitative promise—determined by probation officers, prison officials, and other unelected, unrepresentative bureaucrats—can be extremely arbitrary, especially since these determinations are often collected from functionaries with only minor interactions with the offender. Thus the PSR can contain a variety of unsubstantiated or biased determinations treated as "fact" by the court, far from the eye of the jury.

Stated differently, the PSR is a "classic example of something depending on findings of historical fact, which have never been adjudicated at all, much less adjudicated in a prior proceeding in which the defendant had a right to a jury and truth beyond a reasonable doubt."[304] Accordingly, one solution would be to allow the jury, in a bifurcated sentencing procedure, to

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[304] Weisberg, *supra* note 22, at 648 (citing J. Bradley O'Connell).

determine which facts in the PSR would be eligible to increase or decrease the offender's punishment.[305] Therefore, if information on recidivism, victim impact statements, the offender's prior family history, employment, education, physical and mental health, financial condition, future prospects, and prognosis of rehabilitative promise are seen, as they must, as important factual findings made by bureaucratic functionaries that can increase the defendant's punishment, then at least part of the PSR comes under *Blakely*'s mandate.

b. *Persistent Felony Offender Schemes*

A number of states permit sentence enhancement based on statutes which mix recidivism, past violence, and statements on PSRs. These schemes, sometimes dubbed "three strikes" laws, may also come under *Blakely*'s purview.

Although California can lay claim to the most infamous three-strike law, New York has a persistent felony offender statute that runs counter to *Blakely*'s animating principle. A New York trial court is authorized—but not required—to sentence an offender with two prior felony convictions to a much longer incarceration period than would normally be permitted. The determination of whether the offender is eligible for the "persistent felony offender" status, however, is left to the judge alone, which seems to violate *Blakely* on its face.

Under New York law, when the prosecutor requests persistent felony offender status for a defendant, the trial court holds a hearing to determine whether the severity and number of the offender's past crimes requires adjudication.[306] An enhanced punishment must be based on judicial weighing of the "history and character of the defendant and the nature and circumstances of his criminal conduct."[307] Although some procedural due process is used during the hearing, none of the facts which lead to the imposition of persistent felony offender status is determined by a jury.[308] Instead, the relevant facts are provided by the prosecutor and defense counsel. The court, in a special sentencing hearing, determines whether the convicted offender is classified as a persistent felony offender by evaluating

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[305] *See, e.g.*, Prescott & Starr, *supra* note 216, at 320 ("For instance, if *Blakely* is extended to include the defendant's criminal history, jury review of presentence reports could be far less costly than live testimony on past crimes.").

[306] *See* N.Y. PENAL LAW § 70.10 (McKinney 2005).

[307] N.Y. PENAL LAW § 70.10(2) (McKinney 2005).

[308] *See* N.Y. PENAL LAW § 70.10 (McKinney 2005).

her past criminal history.[309] The offender's criminal history can include past behavior on parole, prior convictions, statements from probation and parole officers, and acquitted conduct. Because persistent felony offender classification results in a lengthened sentence for the offender—substantially greater than any maximum sentence allowed—based on facts found by non-jury members, the persistent felony offender statute runs against *Blakely*'s mandate.

After *Blakely* and *Booker* were decided, New York's persistent felony offender statute was challenged as unconstitutional. In *People v. Rivera*,[310] a criminal defendant was convicted of "unauthorized use of a vehicle in the second degree," a class E felony carrying a maximum sentence of four years imprisonment, and the People moved for persistent felony offender status (in order to treat the conviction as a class A-1 felony).[311] The trial court held a special sentencing hearing, first determining that the defendant qualified as a discretionary persistent felony offender, and then heard arguments from both sides concerning defendant's history and character.[312] Some of the prosecutor's evidence consisted of facts never found by a jury, including the defendant's use of multiple aliases, his failure to comply with probation and parole, his ongoing drug addiction, and his low probability of "ever . . . giv[ing] up the lifestyle he supported by crime."[313]

In determining whether it wished to sentence defendant as a persistent felony offender, the trial court stated to the defendant that "the issue that we are addressing in that respect is whether or not your history, character, the nature and circumstances of your criminal conduct are such that extended incarceration and lifetime supervision of you is warranted to best serve the public's interest."[314] To do so, the court determined, in its own discretion, the stability of defendant's employment history, the theft's effect on the victim, and defendant's alleged attempt to distract the police from the escape of the other car occupants.[315] After finding these facts, the trial court imposed a fifteen years-to-life sentence.[316]

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309 *See* N.Y. PENAL LAW § 70.10 (McKinney 2005).

310 5 N.Y.3d 61 (2005).

311 *Id.* at 63.

312 *Id.* at 63–64.

313 *Id.* at 64.

314 *Id.*

315 *Id.*

316 *Rivera*, 5 N.Y.3d at 65.

On appeal, defendant argued that New York's persistent offender statute violated the Sixth Amendment after *Blakely* because it requires a judge, rather than a jury, to determine whether an offender is eligible for discretionary persistent offender status.[317] The New York Court of Appeals ultimately upheld the persistent felony offender statute, finding that New York's scheme only required proof of two prior felony convictions to qualify a defendant as a persistent felony offender and a life sentence.[318] However, the stark difference between the statutory interpretation of the majority and that of the dissent neatly frames the question of whether *Blakely* should be expanded to ancillary sentencing proceedings.

Both the majority and the dissent agreed on the basic premise that the Sixth Amendment requires that any fact (other than a prior conviction) used to increase a sentence beyond the maximum must be found by a jury beyond a reasonable doubt.[319] It was in their interpretations of the persistent felony offender statute that the two dramatically parted ways.

Under the majority's view, the statute only required two prior convictions to qualify a defendant as a persistent felony offender, and nothing more—no other fact-finding was needed. Accordingly, the *Rivera* court held that the statute's extra procedural language, requiring the trial court to weigh the character of the defendant and "the nature and circumstances of his criminal conduct," served only as extra instructions for the trial court, and was part of its "traditional discretionary sentencing role."[320]

In contrast, the *Rivera* dissents took strong issue with this understanding of the trial court's role determining persistent felony offender status. Chief Judge Kaye's dissent argued that merely qualifying as a discretionary persistent felony offender by dint of having two prior felony convictions was "necessary but not sufficient" to render an offender eligible for enhanced sentencing.[321] Instead, an enhanced sentence was only imposed on those defendants whose "extended incarceration and lifetime supervision will best serve the public interest."[322] In Kaye's view, a convicted offender with two

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[317] *Id.*

[318] *Id.*

[319] *Id.* at 65–66.

[320] *Id.* at 66, 69. In other words, for the majority, the existence of the offender's two prior convictions was the "fact" increasing the sentence, and the determinations regarding the offender's character and nature were just a way to "grant[] defendants a right to an airing and an explanation." *Id.* at 68.

[321] *Id.* at 73 (Kaye, C.J., dissenting).

[322] *Rivera,* 5 N.Y.3d at 73 (Kaye, C.J., dissenting).

prior felony convictions is transformed into a discretionary persistent felony offender only *after* the court makes a determination about his history, character, and past criminal conduct—a process, in other words, on a collision course with *Blakely*.[323]

Since the statute specifically requires the trial court, as part of this second step, to "make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted,"[324] it seems impossible for the *Rivera* court to have construed the discretionary persistent felony offender statute as constitutional following *Blakely* without essentially rewriting the statute—a job for the legislature, not the court. The *Rivera* majority basically stripped the "discretionary" aspect of the statute away without removing the power of the trial court.

The *Rivera* court's decision to lean away from a democratic, community-based consensus on punishment and towards a more judicial role in ancillary sentencing resulted in a movement away from *Blakely*'s mandate. As Judge Ciparick argued in her dissent, "[t]he majority fail[ed] to recognize that the Supreme Court holdings in *Ring*, *Blakely*, and *Booker* represent a significant shift in Sixth Amendment jurisprudence."[325] When analyzed closely, *Rivera* did not honor the Sixth Amendment's reservation of jury power, and permitted an unconstitutional statute to stand.[326]

Most recently, however, two New York federal judges have found New York's persistent felony offender statute unconstitutional. Both the Southern District and the Eastern District of New York have now held that N.Y. Penal Law Section 70.10 violates the Sixth Amendment right to a jury trial because, under the rapidly evolving case law of the U.S. Supreme Court, a jury has to find the facts that the state law leaves to the judge.[327] These decisions directly conflict with another Southern District decision holding

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[323] *Id.* at 74 (Kaye, C.J., dissenting). Kaye's dissent argued precisely thus: "*Blakely* makes clear that *any factfinding* essential to sentence enhancement must be decided by a jury, even if it is general and unspecified in nature, and even if the ultimate sentencing determination is discretionary." *Id.* at 73.

[324] N.Y. CRIM. PROC. LAW. § 400.20(9) (McKinney 2005).

[325] *Rivera*, 5 N.Y.3d at 83 (Ciparick, J. dissenting).

[326] *Rivera* is currently good law in New York, despite the Second Circuit's description of the statute's second phase as "a vague, amorphous assessment" of whether the public interest would be served through imposition of a recidivist sentence. Brown v. Grenier, 409 F.3d 523, 534 (2d Cir. 2005). However, *Brown*, which upheld the statute, was based on an *Apprendi* challenge to the statute, not *Blakely*. Accordingly, *Rivera* could potentially be overturned on *Blakely* grounds.

[327] *See* Washington v. Poole, No. 06 Civ. 2415 (JGW), 2007 WL 24335166 (S.D.N.Y. Aug. 28, 2007); Portalatin v. Graham, 478 F. Supp.2d 385 (E.D.N.Y. 2007).

that New York's persistent felony offender statute is constitutional after *Blakely*.[328] All of these decisions will join a fourth that is currently pending in the Second Circuit.[329] Thus the constitutionality of New York Penal Law Section 70 after *Blakely* is still very much in dispute.

c. *Prior Convictions*

One area of ancillary sentencing that has resisted the incursion of *Blakely* is in the use of prior convictions. This is an area ripe for change, however. As I briefly discussed above, one result of *Almendarez-Torres* was the preservation of the "prior conviction" exception for sentencing procedures.[330]

Specifically, both *Apprendi* and *Blakely* state that their rule requiring certain facts to be either proven to a jury beyond a reasonable doubt or admitted by the defendant only applies to facts "other than the fact of a prior conviction." This exception conflicts with *Blakely*'s animating principles, since prior convictions can often be both inaccurate and confusing.[331] Moreover, when the specific facts of the prior conviction are in dispute, it is currently the trial court that resolves any question of fact regarding a prior conviction.

The theoretical basis of *Almendarez-Torres*' "prior conviction" exception has been repeatedly questioned, most recently by Justice Clarence Thomas. In the dissent from the denial of certiorari in *Rangel-Reyes v. United States*, Thomas got straight to the heart of the matter. Citing *Apprendi* numerous times, Thomas argued that if a crime includes all facts used as a basis for imposing or increasing punishment,[332] then the prior conviction exception is grounded not in the Constitution, but only in Supreme Court precedent: "[T]he exception to trial by jury for establishing 'the fact of a prior conviction' finds its basis not in the Constitution, but in a precedent of this Court."[333]

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[328] *See* Morris v. Artus, No. 06 Civ. 4095 (RWS), 2007 WL 2200699 (S.D.N.Y. July 30, 2007).

[329] *See* Phillips v. Artus, No. 05 Civ. 7974 (PAC), 2006 WL 1867386 (S.D.N.Y. June 30, 2006).

[330] Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998).

[331] Such as out-of-state or foreign convictions; sometimes an offense can be a felony in one state and a misdemeanor in another, or differ in levels of degree.

[332] In other words, what I have been calling the animating principle of *Blakely*.

[333] Rangel-Reyes v. United States, 126 S. Ct.. 2873, 2874 (2006) (Thomas, J., dissenting) (citations omitted).

By demoting the prior conviction exception from constitutional rule to mere precedent, Thomas set the stage for possibly overruling the exception. And in repeatedly referring to *Apprendi*, Thomas returned to the heart of the Sixth Amendment jury trial guarantee, that only a jury may find facts that increase an offender's punishment. The implication is that the *Almendarez-Torres* exception could be overruled as a court-made rule.

On a more practical note, Thomas also noted that a majority of the current Court rejected the exception,[334] and it was its positive duty to "address the ongoing validity"[335] of the exception—not only because it was the Court's sole prerogative,[336] but also because until the exception's reversal, "countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments, notwithstanding the agreement of a majority of the Court that this result is unconstitutional."[337] Thomas's return to the bedrock guarantees of the Fifth and Sixth Amendments, and his concern over the shortchanged rights of criminal offenders, helps illustrate the continuing importance of the Court's "rediscovered" right to a jury trial for all facts enhancing punishment, precedent and *stare decisis* notwithstanding. For Thomas, and for a growing number on the Court, the animating principles of *Blakely* must trump any judge-made rules.

Thomas's statements, in both *Shepard* and *Rangel-Reyes*, strongly suggest that there are no longer five Justices who support the *Almendarez-Torres* exception.[338] Nevertheless, the "prior conviction" exception currently remains good law.

A few courts had begun to question the prior conviction exception even prior to *Shepard*'s signal that it might be endangered. For example, one district court has suggested that *Blakely* may necessitate the use of indictments to allege prior convictions that will be used to enhance the defendant's sentence. In *Wilson v. McGinnis*,[339] the Southern District of New York noted that: "Due process requires notice of sentence enhancements based on recidivism . . . . Indeed, notice of the enhancement probably has to be alleged in the indictment."[340] In other words, the

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[334] *See id.*

[335] *Id.* at 2875.

[336] *Id.*

[337] *Id.*

[338] Particularly with the 6-3 split in *Cunningham*. Any attempt to "read the tea-leaves," though, is purely speculative on my part.

[339] No. 03 Civ. 4625(AKH), 2004 WL 1534160 (S.D.N.Y. July 8, 2004).

[340] *Wilson*, 2004 WL 1534160 at *6 n.5.

Southern District of New York argued that fully complying with *Blakely*'s Fifth and Sixth Amendment guarantees requires actual allegations of the prior crimes in the *indictment*—i.e., well before the trial, let alone sentencing—instead of in the PSR.

Such reasoning, combined with Thomas's strong hints dropped in *Shepard* and his dissent from *Rangel-Reyes*'s certiorari denial, may ultimately lead to a revision of the prior conviction exception, if not to its outright reversal.[341] Accordingly, it is an ancillary sentencing procedure upon which to focus in the coming terms.

d. *Probation*

In contrast to prior convictions, probation has been given little scrutiny so far. Probation is most often imposed on convicted defendants in lieu of a sentence, or as part of a suspended sentence.[342] In many states, a term of probation means a suspension of the execution of a sentence and an order of conditional and revocable release under the supervision of a probation officer.[343] One hallmark of this kind of dispositional departure is the trial court's flexibility in shifting from a presumptive non-incarcerative sentence, such as an out-of-prison probationary length of time, to a term of

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[341] I only briefly touch on the prior conviction exception here, as its full ramifications go well beyond the scope of this piece.

[342] *See generally* Scott H. Ikeda, *Probation Revocations as Delayed Dispositional Departures: Why* Blakely v. Washington *Requires Jury Trials at Probation Violation Hearings*, 24 LAW & INEQ. 157 (2006).

[343] *See* TEX. CONST. art. IV § 11A (Texas state courts have power to impose probation as part of suspended sentence); CAL. PENAL CODE § 1203(a) (West 2004 & Supp. 2007). *See also* CONN. GEN. STAT. ANN. § 53a-29(a) (West 2001 & Supp. 2007) (period of probation in lieu of incarceration and includes probation supervision); FLA. STAT. ANN. §§ 948.001(1), (2) (West 2001 & Supp. 2007) (probation instead of prison term or as part of a suspended sentence that includes supervision); 730 ILL. COMP. STAT. ANN. 5/5-6-1 (West 1993 & Supp. 2007) (court may impose probation instead of imprisonment, probation agency must supervise); MASS. ANN. LAW. ch. 279, § 1A (LexisNexis 2002) (probation a condition of suspended sentence); N.Y. PENAL LAW § 65.10(3)(a) (McKinney 2004 & Supp. 2007) (probation imposed with supervision by officer when confinement found unnecessary); OR. REV. STAT. § 137.533 (2005) (court can sentence prisoner to probation in lieu of sentence or as part of suspended sentence, supervised by probation officer); VA. CODE ANN. § 19.2-303.2 (2004) and § 53.1-145 (2005 & Supp. 2007) (court may sentence first-time offender to probation, supervised by probation officer); WASH. REV. CODE ANN. § 9.92.060 (West 2003 & Supp. 2007) (court may summarily grant probation and order supervision of offender).

incarceration. These decisions to impose these dispositions are often based entirely on a judicial factual determination.[344]

Most supervised probation follows similar patterns. These include a requirement to meet regularly with a counselor or probation officer (often, but not always, from the department of corrections), a long list of forbidden activities and associations,[345] and some sort of procedure in which the facts of an alleged violation can be determined and adjudicated, most often under a preponderance of the evidence standard. Although the prosecutor has the burden of persuasion at these revocation hearings, she is not required to prove the violation beyond a reasonable doubt, as she would at trial.[346] An offender's violation of probation terms usually results in incarceration, either for the first time (as in a stayed sentence) or as a return to prison.[347]

The Supreme Court has held that the determination of a violation of probation is entitled to the minimum requirements of due process, including written notice of the claimed violations.[348] Likewise, most states require some sort of due process hearing in front of a court before probation is revoked and a person is returned to prison. For example, in Massachusetts, a violation of a condition of probation must be found "at least to a reasonable

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[344] If, however, the terms of probation were authorized by a legislature via statute, the *Blakely* problem would be significantly diminished. Because the imposition of such non-incarcerative sentence would be determined by duly elected representatives of the community, whatever Sixth Amendment rights necessary to impose such a disposition would be met.

[345] For example, in Florida, an offender's term of probation could include community-based sanctions such as rehabilitative restitution, curfew, revocation or suspension of a driver's license, community service, deprivation of non-essential activities or privileges; random substance abuse testing; home visits by probation supervisors; steady employment; restriction of movement; support of legal dependants; no interaction with criminals; prohibition on possessing firearms; prohibition on alcohol consumption and on visiting places where such intoxicants are sold; drawing of blood; and other unspecified terms. *See* FLA. STAT. ANN. §§ 948.01(3)(a), 948.03(a)–(n) (West 2001 & Supp. 2007).

[346] *See* Brian G. Bieluch, *Thirty-First Annual Review of Criminal Procedure: IV. Sentencing: Probation*, 90 GEO. L.J. 1813, 1826 (2002).

[347] *See, e.g.*, KAN. STAT. ANN. § 22-3716(b) (1995 & Supp. 2006) (statute regarding stayed sentence and probation revocation).

[348] *See* Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) (holding that a probationer under a suspended sentence entitled to minimum requirements of due process before probation could be revoked); Morrissey v. Brewer, 408 U.S. 471, 486–87 (1972) (explaining minimum due process proceedings required at probation revocation hearings).

degree of certainty."[349] In Florida, a probationer must receive proper notice of the claimed violation, as well as some minimum due process, before probation can be revoked.[350] In Connecticut, a revocation of probation hearing has been determined to be less formal than a criminal trial, and requires only that the state prove its case by a preponderance of the evidence.[351] In Tennessee, after a violation of probation is alleged, a hearing is held in front of a trial court, and the defendant is allowed to testify;[352] guilt must be proven by a preponderance of the evidence.[353]

Often state court judges have the ability to lengthen the sentence at a probation violation proceeding, something *Blakely* may now require to be left in the hands of the jury, or at least some representative of the community. For example, in North Dakota, a court may re-sentence a defendant to a harsher sentence than his original sentence imposed,[354] under the reasoning that this "does not subject him to multiple punishments for the same offense."[355] "Such a practice, rather, 'reflects the need to alter the defendant's sentence in light of the fact that the court's initial sentence of probation was not effective and must be altered.'"[356]

To best see the great discretion given to courts and state corrections boards in the area of probation, it is helpful to study a state's statutes in depth. One excellent example is California, which processes a large number of offenders through its prisons on a yearly basis. California governs its ancillary sentencing procedures through either judicial or bureaucratic actors, with very little jury (or democratic) participation. In that sense, it is about as far from *Blakely*'s animating principles as a state can get.

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[349] Commonwealth v. Maggio, 605 N.E.2d 1247, 1250 (Mass. 1993). *See also* Commonwealth v. Durling, 551 N.E.2d 1193, 1195 (Mass. 1990) (defendant at probation revocation proceedings entitled to certain due process protections).

[350] *See* State v. Spratling, 336 So. 2d 361 (Fla. 1976) (where probationer failed to receive proper notice of claimed violation serving basis of probation revocation, not afforded due process).

[351] *See* State v. McDowell, 699 A.2d 987, 989 (Conn. 1997); State v. Davis, 641 A.2d 370, 378 (Conn. 1994).

[352] State v. Wade, 863 S.W.2d 406, 408 (Tenn. 1993).

[353] *See* TENN. CODE ANN. § 40-35-311(e) (2006).

[354] Davis v. State, 625 N.W.2d 855, 858 (N.D. 2001).

[355] *Id.* at 859 (quoting State v. Jones, 418 N.W.2d 782, 784 (N.D. 1988)).

[356] State v. Jones, 418 N.W.2d 782, 784 (N.D. 1988); *see also* State v. Miller, 418 N.W.2d 614, 616 (N.D. 1988). When a defendant's probation is revoked, Section 12.1-32-07(4) of the North Dakota code provides a trial court with the authority to re-sentence him to *any* sentence originally available.

With probation, California's trial courts determine whether a convicted offender may receive a sentence of probation, or "the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community."[357] Additionally, in cases involving hate crimes, the trial court has the authority to require the convicted offender's participation in a variety of alternative sanctions *in addition* to the sentence of probation, including the completion of a class or program on racial/ethnic sensitivity or civil rights, additional restitution to programs or agencies that provide service, and reimbursing the victim for reasonable costs of counseling.[358] Since the imposition of these punishments is fully discretionary on the part of the court, and increases the offender's punishment, this qualifies as a form of fact-finding by the judge forbidden by *Blakely*.

Once removed from the California courtroom, the fact-finding for probation shifts from judicial to wholly bureaucratic—moving further and further away from *Blakely* legitimacy. Supervision of the probationer falls to the county probation officer "who . . . determine[s] both the level and type of supervision consistent with the court-ordered conditions of probation."[359] The probation officer is the sole determinant of whether the probationer has violated any of the terms of probation.[360] Violation of probation terms usually results in revocation of the conditional release.[361]

Likewise, California's Proposition 36 contains a variety of fact-finding procedures by non-jury actors that often increase a convicted offender's punishment. Proposition 36 requires a sentence of probation and drug treatment instead of prison for those non-violent drug offenders arrested for personal use crimes, with exceptions for offenders who "refuse" or are "unamenable" to treatment.[362] Decisions about personal drug use, refusal of drug treatment, and general amenability to rehabilitation are made solely by the trial court.[363] It seems, then, that California's ancillary sentencing proceedings lean heavily towards the bureaucratic and judicial, as opposed to the democratic—a state of affairs clearly in opposition to the animating principle of the *Apprendi-Blakely* line of cases.

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[357] CAL. PENAL CODE § 1203(a) (West 2004 & Supp. 2007).

[358] CAL. PENAL CODE §§ 422.85(a)(1)–(3) (West 2004 & Supp. 2007).

[359] *See* CAL. PENAL CODE § 1202.8(a) (West 2004 & Supp. 2007).

[360] *See* CAL. PENAL CODE § 1203.2(a) (West 2004 & Supp. 2007).

[361] *See* CAL. PENAL CODE § 1203.2(a) (West 2004 & Supp. 2007).

[362] *See* Wool, *supra* note 205, at 140.

[363] *See id.*

Within the ten states I studied, probation was primarily used as a court-ordered measure in lieu of a sentence, or as part of a suspended sentence.[364] Only one state, Florida, used probation as both a conditional release system and as a form of a suspended sentence.[365] In each of the states I surveyed, the trial court determined whether the defendant was eligible for probation, and in many states, also set the long list of conditions that the probationer had to follow.[366] As I briefly discussed above, the list of conditions imposed by the court can be lengthy and onerous (such as in Florida). Although these conditions may not technically increase the length of an offender's sentence, their imposition definitely enhances the offender's punishment. Although the legislature sets the terms of the conditions, the decision whether to implement them is left to the court, not the jury. [367]

Once the term of probation has been set, a combination of judicial and bureaucratic decision-makers decide the facts that determined whether probation has been properly followed. Usually, the evidence of a possible probation violation is collected by the probation officer or commission, and any decision to revoke the period of probation is made by the court.[368] The jury, however, has no hand in any aspect of probation, from imposition to

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[364] *See, e.g.*, TEX. CONST. art. IV § 11A; CAL. PENAL CODE § 1203(a) (West 2004 & Supp. 2007); CONN. GEN. STAT. ANN. § 53a-29(c) (2001 & Supp. 2007); 730 ILL. COMP. STAT. ANN. 5/5-6-3 (West 1993 & Supp. 2007); MASS. ANN. LAWS ch. 276, § 87 (LexisNexis 2002 & Supp. 2007); N.Y. PENAL LAW § 65.10 (McKinney 2004 & Supp. 2007); OR. REV. STAT. § 137.533 (2005); VA. CODE ANN. § 19.2-303.2 (2004); WASH REV. CODE ANN. § 9.95.204 (West 2003 & Supp. 2007).

[365] *See* FLA. STAT. ANN. § 948.01(2) (West 2001 & Supp. 2007) (court releases offender on probation if determined that "ends of justice and the welfare of society do not require" incarceration); FLA. STAT. ANN. § 947.1405(3) (West 2001 & Supp. 2007) (probation used as part of conditional release process from prison).

[366] *See, e.g.*, TEX. CONST. art. IV § 11A (conditions set by statute); CONN. GEN. STAT. ANN. § 53a-29(a) (West 2001 & Supp. 2007); FLA. STAT. § 948.01 (2005); 730 ILL. COMP. STAT. ANN. 5/5-6-2 (West 2001 & Supp. 2007) (conditions of probation set by statute); MASS. ANN. LAWS ch. 276, § 87A (LexisNexis 2002); N.Y. PENAL LAW § 65.10 (McKinney 2004 & Supp 2007); OR. REV. STAT. § 137.540 (2005) (conditions of probation set by statute); VA. CODE ANN. § 19.2-303.2 (2004) (probation for misdemeanor offenses); WASH. REV. CODE ANN. § 9.95.200 (West 2003 & Supp. 2007).

[367] For another discussion of conditions added to probation, *see* Wool, *supra* note 205, at 7 (discussing whether a sentence includes "dispositional sentencing determinations," which "alters the manner of service rather than the duration of the sentence" for *Blakely* purposes). *See also* Ikeda, *supra* note 342, at 158.

[368] *See* CAL. PENAL CODE § 1203.2 (West 2004 & Supp. 2007); CONN. GEN. STAT. ANN. § 53a-32(a) (West 2001 & Supp. 2007); FLA. STAT. ANN. § 948.06(2)(a) (West 2001 & Supp. 2007).

revocation, despite its potential to increase the kind and length of prison sentence for the probationer.

In sum, a change in sentence from a non-incarcerative probation period to a term of imprisonment, based on factual determinations made by non-jury actors, might be seen as an increase in the maximum sentence.[369] As probation is currently constituted in many states, it does not seem to follow the requirements of *Blakely*.[370] If length of punishment is measured by length of time in prison—as our system, and even the most minimalist interpretation of *Blakely*, currently does measure it—then changes in dispositional departures come into *Blakely*'s gambit.[371] As such, many states may want to rethink the vast discretion given to courts and state agencies during and after the sentencing hearing.

3. *Back-End Sentencing:* Blakely *and Post-Sentencing Procedures*

A sentence does not end upon the completion of the offender's term of imprisonment, of course. As a matter of definition, a modern sentence includes all aspects of supervision to which the offender is subject, including parole, post-release supervision, and restitution. Once a prisoner is released, the terms of her probation and supervised release, initially determined by the state legislature and court imposed, are enforced and regulated by parole officers. The amount of restitution, although imposed during the sentencing proceeding, is collected after the sentencing hearing by either the trial court or the parole officer. These back-end sentencing proceedings, which can increase the length and the burden of an offender's sentence, must also be

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[369] Whether this kind of sentence change from probation to incarceration would also be seen as punishment is a more complicated matter. On the one hand, the Supreme Court has made clear that not every imposition on offenders and/or prisoners constitutes impermissible punishment. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 484–85 (1995) (rejecting due process challenge to in-prison discipline). On the other, the decision to revoke a sentence of probation, thereby denying the offender her liberty, certainly has a punishing effect. Because I lean towards a broader conception of punishment, I would tend to include the revocation of probation as a punishment under *Blakely* terms, but recognize the arguments against it.

[370] *See, e.g.*, Ikeda, *supra* note 342, at 175 ("[U]pward dispositional departures enhance the severity of a defendant's sentence, again implicating *Blakely* . . . . It is undeniable that sentences of commitment to state prison are more serious than stayed sentences of probation.").

[371] Prior to *Blakely*, both Kansas and California state courts held that *Apprendi* did not apply when a sentence of probation was increased to incarceration. *See* State v. Carr, 53 P.3d 843, 850 (Kan. 2001); People v. Saenz, No. D039214, 2003 WL 133020, at *3–4 (Cal. Ct. App. Jan. 17, 2003) (unpublished).

considered in *Blakely*'s wake. For too long, the system of back-end sentencing has been hidden from public view.[372]

Most criminal sentences involve a period of supervised release following the completion of the imposed sentence.[373] A violation usually leads to the revocation of the conditional release, and sometimes even lengthens the duration of the original prison term.[374] The question of whether supervised release has been violated is determined by the trial court, using some minimum level of procedural due process, with facts provided by a probation officer or the department of corrections.[375]

When prisoners are released before serving their full sentences, they are invariably placed on supervised release. For example, when federal offenders are released from prison, they are supervised for a period imposed by the judge as part of the sentence.[376] The Guidelines require that nearly all felony offenders be sentenced to at least two years of supervised release following incarceration,[377] and as most federal courts still follow the Guidelines to some extent, this kind of supervised release is still in practice. Additionally, parole boards still exist in the majority of states, in the federal system for those prisoners who committed their crimes before 1987, and in the military—although they possess varying levels of discretion.[378]

As a beginning matter, having courts or administrative officials determining facts regarding parole or post-release supervision violation—facts that can have a very real effect on the length of convicted defendants' sentences—seems to conflict with *Blakely*. If, à la *Blakely*, a jury must decide all facts that could increase a defendant's maximum sentence, then a variety of parole and post-release proceedings would be subject to the rediscovered Sixth Amendment right discussed above. Furthermore, if

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372 Travis, *supra* note 7, at 6.

373 For example, in New York, all felonies come with a period of post-release supervision between one and five years, depending on the severity of the offense. *See* N.Y. PENAL LAW § 70.45 (McKinney 2004 & Supp. 2007).

374 *See* Bamonte, *supra* note 239, at 123.

375 In addition, in probation revocations, courts have unilateral discretion to execute the sentence and send the defendant to prison. *See, e.g.*, Ikeda, *supra* note 342, at 157.

376 STITH & CABRANES, *supra* note 114, at 5 n.9. As noted above, parole has been eradicated in the federal system.

377 STITH & CABRANES, *supra* note 114, at 5 n.9.

378 *See* THE ASSOCIATION OF PAROLING AUTHORITIES INTERNATIONAL & THE NATIONAL INSTITUTE OF CORRECTIONS, HANDBOOK FOR NEW PAROLE BOARD MEMBERS 1 (Peggy B. Burke ed., 2003), *available at* http://www.apaintl.org/en/aw_publications.html.

Blakely's animating principles are followed, virtually all proceedings determining parole and post-release supervision would fall into its gambit.

There are few procedures and safeguards in most parole and post-release supervision proceedings, and the decisions are most often made by a member of the corrections bureaucracy. Because no one in such systems is responsible for creating sentencing policy on a systemwide level, the case-by-case decisions of parole boards and probation officers can be "astonishingly haphazard."[379] These federal and state standards are far from the requirements that are inherent in the Sixth Amendment jury right.[380] *Blakely* suggests that it is time to reevaluate the decision-makers who determine the outcomes of post-prison release proceedings.

These assertions are best supported by surveying the actual statutes regulating parole and post-release supervision from certain representative states. For greater clarity, I have divided my analysis of the collected data into three categories, parole, post-release supervision, and restitution.

a. *Parole*

Parole is the ancillary sentencing procedure that comes most readily to mind in the popular imagination. A prisoner's parole date can play a large role in increasing or decreasing the actual length of his imprisonment.[381] This decision is made not by judge, jury, or legislature, but by a disparate assortment of prison officials and department of corrections personnel. It is the parole board, "acting as a back-end [sentencing authority], which determines the actual incarceration length by deciding if or when to grant the inmate discretionary parole release."[382] A prisoner's parole release date relies primarily on two things: his or her behavior in prison (often

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[379] Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL'Y 389, 390 (1998).

[380] There has been some commentary, by federal public defenders and others, that *Booker* also leaves room for requiring beyond a reasonable doubt for all sentencing facts. *See* Posting of Steve Sady to Ninth Circuit Blog, http://circuit9.blogspot.com/2005_01_01_circuit9_archive.html (Jan. 21, 2005, 7:15 EST); Doug Berman, *Now What? The Post-*Booker *Challenge For Congress and the Sentencing Commission*, 18 FED. SENT'G REP. 157 (2006).

[381] This is particularly true in indeterminate sentencing systems, where the minimum term portion of the sentences "controls the period a defendant *must* serve before eligibility for release, and thus the likelihood of the duration [served]. It does not, however, absolutely control that duration; a parole board makes the subsequent release decision." *See* Wool, *supra* note 205, at 139 (emphasis added).

[382] Chanenson, *supra* note 212, at 187.

characterized as good-time credits/punishment), and which officials constitute the parole board.

As Steven Chanenson has pointed out, "[a]lthough discretionary parole release is largely off the national sentencing reform radar, it remains a vital part of American criminal justice."[383] Although parole has been eradicated in the federal system,[384] it still plays a relatively large role in the states, particularly in those states with indeterminate sentencing systems—the most common approach to sentencing at this point.[385] Approximately one-third of all admissions to state prisons are individuals being returned for parole violations.[386] Thus parole still plays an integral role on the back-end of criminal sentencing procedures.

The Supreme Court has had difficulty defining the post-conviction rights of prisoners, particularly in parole decisions.[387] In *Morrissey v. Brewer*,[388] the Supreme Court noted that "parole is an established variation on imprisonment of convicted criminals . . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."[389] In other words, the Supreme Court essentially delegated its authority to the prisons, holding that parole is less a post-prison sentencing procedure than an in-prison reward. Nonetheless, parole is still subject to constitutional requirements, despite the discretion[390] allowed to prison administrators.[391]

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[383] *Id.*

[384] *See* STITH & CABRANES, *supra* note 114, at 5. Under the Sentencing Reform Act, federal offenders sentenced to prison can no longer obtain early release on parole, which has been abolished. *Id.*

[385] Chanenson, *supra* note 212, at 187.

[386] *See* Travis, *supra* note 7, at 2.

[387] *See* Phillip Strach, Ohio Adult Parole Authority v. Woodward: *Breathing New "Life" into an Old Fourteenth Amendment Controversy*, 77 N.C. L. REV. 891, 891 (1999). *See also* Greenholz v. Nebraska, 442 U.S. 1 (1979) (discussing parole release).

[388] 408 U.S. 471 (1972).

[389] *Id.* at 477.

[390] The Court recognized in *Greenholz* that a parole decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." *Greenholz*, 442 U.S. at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)). This is a classic example of the 1970's rehabilitationist rationale.

[391] Most recently, the Supreme Court weighed in on the Fourth Amendment right of parolees in *Samson v. California*, 126 S. Ct. 2193 (2006). The Court held that the Fourth Amendment does not prohibit police officers from conducting these sorts of

This leads us back to our original question: does *Blakely* affect parole? The preliminary answer is no. Although parole may be in the orbit of the general animating principles of *Blakely*, it may also be the least affected by it. First, most terms of parole allow the offender an early release from his or her sentence. Thus, if the maximum sentence is assumed to be the full term of imprisonment, and a parole violator is forced to serve his or her full term, it is hard to see how the decisions of the parole officer and/or the corrections officials actually increase the prisoner's sentence *beyond* the maximum.

Second, and perhaps more critically, *Blakely* itself seems to specifically exempt parole: "[o]f course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion."[392] This exception for a parole board's sentencing discretion, originally articulated by *Morrissey*, does not leave much room for the role of the jury in parole hearings.

Finally, *Williams* seems to stand in the way of applying the *Blakely* principles to parole. In *Williams*, described by one scholar as "[t]he 1949 bulwark of procedural laxity at sentencing,"[393] the Supreme Court upheld the exercise of unadulterated discretion against a due process challenge. *Williams*' holding was explicitly premised on a rehabilitationist rationale, which seemingly required an increase in the court's discretionary powers.[394] Under *Williams*'s reasoning, sentencing authorities (both judges and "nonjudicial agencies," including probation departments and departments of correction) were required to have access to all possible information about the convicted defendant, unrestricted by evidentiary and other limitations, on the idea that with "careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship."[395] And as discussed above, although rehabilitative philosophy has been mostly eradicated from parole determinations, unadulterated discretion still remains.[396] Thus, the

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suspicionless prisoner searches, because parole is a type of a prison term that continues outside of the prison, and prisoners are normally subject to suspicionless searches. *Id.* at 2202.

[392] Blakely v. Washington, 542 U.S. 296, 309 (2004).

[393] Reitz, *supra* note 216, at 1083.

[394] Harris, *supra* note 91, at 85.

[395] Williams v. New York, 337 U.S. 241, 249 (1949).

[396] Post-*Blakely*, scholars have called for the overruling of *Williams*. *See* Reitz, *supra* note 216, at 1082. Until this happens, however, we are still bound by its dictates.

institution of parole, as the law currently stands, need not meet *Blakely*'s mandate.

Viewed most broadly, however, parole may be subject to *Blakely*'s animating principle—after all, the Sixth Amendment never draws a line between punishment imposed inside and outside a prison. Stated differently, if *Blakely* is expansively interpreted—that only juries may find facts that increase an offender's punishment—then parole may come into its ambit.

Under this more sweeping interpretation, there are two areas where *Blakely* could potentially affect parole: in the initial grant of parole by the corrections department, and in the determination of whether a parolee has violated her parole terms. Both are subject to the same general critique regarding parole: that parole release, like many other sorts of "back-end" ancillary sentencing proceedings, has "historically been an unstructured and wildly discretionary power, subject to the same kinds of irrationalities and abuses that afflict old-style, fully discretionary judicial sentencing on the front-end."[397] It is also up for debate whether parole boards can realistically predict regarding offenders' future criminal behavior.[398]

To answer this *Blakely* question, it is necessary to delve deeper into the details of parole supervision, at least as it functions in the states. In indeterminate systems, parole is granted at the discretion of parole boards,[399] while in determinate sentencing systems, the earliest release date is fixed by statute[400] and can be granted after a prisoner has served a certain proportion of his sentence, assuming good behavior. When a prisoner is up for parole, he or she usually goes in front of the prison's parole board, staffed by department of corrections or parole board officials, which determines whether the offender is eligible for early release.[401] A majority of inmates

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[397] Chanenson, *supra* note 212, at 187 (citing Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 450 (2005)).

[398] Chanenson, *supra* note 212, at 187.

[399] Bamonte, *supra* note 239, at 126.

[400] *Id.* at 133.

[401] *See* CONN. GEN. STAT. ANN. § 54-125 (West 2001 & Supp. 2007) (prisoner may be paroled in discretion of panel of Board of Pardons and Paroles); FLA. STAT. ANN. § 947.13 (West 2001 & Supp. 2007) (same); MASS. ANN. LAWS ch. 127, § 136 (LexisNexis 2003) (release of prisoner by parole board solely on board's initiative); N.Y. EXEC. LAW § 259-c (McKinney Supp. 2007) (same); OR. REV. STAT. § 144.050 (2005) (same); TEX. GOV'T CODE ANN. § 493.005 (Vernon 2004), § 508.0441 (Vernon 2004 & Supp. 2006) (same); VA. CODE ANN. § 53.1-136 (2005 & Supp. 2007) (same); WASH. REV. CODE ANN. § 9.95.110 (West 2003 & Supp. 2007) (same).

released today have not "earned" their release, but have been automatically released.[402]

Once released, parolees are supervised by parole field services officers.[403] Released offenders must regularly report to an assigned parole officer, who, with the help of the parole board, determines whether the parolee has "violated" parole by failing to comply with all terms and conditions of parole.[404] Determining whether the parolee has abided by these regulations is the principal responsibility of the parole agent.[405] These conditions can include restrictions on association with felons/gang members; mandatory meetings with parole officers; forbidden possession of weapons; mandatory abstinence from drugs and alcohol; medical or psychiatric treatment; frequent searches of persons, possessions, and residences; travel requests; mandatory child support; school attendance; and community service, among many others.[406]

Parole officers, however, tend to have large caseloads and little money to truly supervise, help rehabilitate, or even meet with their released prisoners on a regular basis.[407] Such limited contact between parole officers and parolees means that the officials who determine parole violations on a regular basis do not have much data about the released offenders or "their prospects when making revocation decisions."[408]

Moreover, as a whole, parole agents have become "less kind and gentle" in supervising released prisoners.[409] Parole officer training generally provides little emphasis on casework and service referrals, but much more on

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[402] PETERSILIA, *supra* note 237, at 79.

[403] *Id.* at 77.

[404] *See, e.g.*, CAL. PENAL CODE § 3060 (West 2005) ("The parole authority [has] full power to suspend or revoke any parole and to order returned to prison any prisoner on parole."); CONN. GEN. STAT. ANN. § 54-126 (West Supp. 2007) (providing that the Board of Pardons and Paroles establishes rules and regulations for parole); FLA. STAT. ANN. § 947.13(1)(c) (West 2001) (same); N.Y. EXEC. LAW § 259-c (McKiney 2005) (same); OR. REV. STAT. § 144.040 (2005) (same); TEX. GOV'T CODE §§ 508.045, 508.0441 (Vernon 2004) (same); VA. CODE ANN. § 53.1-136(3) (2005) (same); WASH. REV. CODE ANN. § 9.95.110 (West 2003) (same).

[405] PETERSILIA, *supra* note 237, at 77.

[406] *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/3-3-7a(1)-(16) (West Supp. 2007); N.Y. PENAL LAW § 65.10(2)(a)–(l) (McKinney 2004 & Supp. 20007); OR. REV. STAT. § 144.102 (2005); WASH. REV. CODE ANN § 72.04A.080 (West 2003 & Supp. 2007); CAL. CODE REGS., tit. 15, §§ 2512, 2513 (2007).

[407] Bamonte, *supra* note 239, at 134.

[408] *Id.*

[409] PETERSILIA, *supra* note 237, at 11.

law enforcement techniques.[410] This bias towards law enforcement "increasingly reinforces the image of parole officers as cops rather than social workers."[411] To enforce their powers, parole agents have legal authority to carry and use firearms; to search people, places, and property free of Fourth Amendment concerns; to order arrests without probable cause; and to confine parolees without bail.[412] As Joan Petersilia has observed, "[t]he ability to arrest, confine, and . . . reimprison the parolee for violating conditions of the parole agreement makes the parole agent a walking court system."[413]

The revocation hearings are where the parole officer wields the greatest power. Roughly one-third to one-half of all parolees faces a revocation action.[414] These hearings are often "empty ritual[s] with a preordained result,"[415] imprisoning, without possibility of bail, almost every parolee accused of a violation.[416] After *Morrissey*, parolees are rarely represented by defense counsel, and there are few, if any, confrontation or cross-examination rights.[417] It is not uncommon for a parole revocation to be based on hearsay testimony of third parties contained only in police reports.[418] The minimal due process rights of parolees, combined with the

> relaxed evidentiary requirements, the state's low burden of proof, the modest cost of informal revocation hearings and the ineffectual defense put up by nearly all parolees gives the state a chance to easily and cheaply reincarcerate parolees based upon a minimal investment of a police report, 10–15 minutes of a hearing officer's time and some paperwork.[419]

This is hardly a jury-determined imposition of punishment.

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[410] *Id.*

[411] *Id.*

[412] *Id.* at 81–82.

[413] *Id.* at 82.

[414] *See* BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990 667 (Kathleen Maguire & Timothy J. Flanagan eds., 1991).

[415] Bamonte, *supra* note 239, at 135. *See generally* Thomas Bamonte & Thomas M. Peters, *The Parole Revocation Process in Illinois*, 24 LOY. U. CHI. L.J. 211 (1993) (criticizing the lack of due process in Illinois parole revocation proceedings).

[416] Bamonte & Peters, *supra* note 415, at 224–25.

[417] Bamonte, *supra* note 239, at 136.

[418] *Id.*

[419] *Id.*(citations omitted).

Because it is the parole officer who, for the most part, gets to make the factual determination whether these violations have occurred, and whether to bring the revocation action in the first place, this bureaucratic decision-making seems to be a *Blakely* violation. By transferring power from the jury to a parole officer, the ability to make the all-important determinations of fact that increase punishment is removed from the community, where it historically and rightfully belongs, to an arm of the vast corrections and sentencing bureaucracy.

Because parole boards are administrative bodies, often entirely lacking in legal training, and the parole hearings are usually secret,[420] extra punishment is often given to a released offender with very few legal protections. This violates the convicted offender's Sixth Amendment jury right, and seems to run counter to *Blakely*. Jeremy Travis states this point more strongly, arguing that parole violation adjudications are a form of sentencing, and should be entitled to the same protections.[421]

Ultimately, only the Supreme Court can make parole subject to *Blakely*'s dictates, as much as it may need reformation.[422] There is a strong case for the expansion of *Blakely*'s boundaries to include parole, however, if its jurisprudential underpinnings are taken into account. Parole is an ancillary sentencing proceeding most easily supervised by the community, as it takes place outside of prison walls. Instead of having parole supervised by overburdened parole officers with no ties to the neighborhood, parole could be supervised by designated officials, either appointed or volunteer, who live in and are invested in the community.

Having community members supervise parole, particularly for low-level offenders, would ground the punishment in Sixth Amendment reasoning without forcing extra burdens on the criminal jury. Moreover, requiring some of the community service often required of parolees to happen in the neighborhood where the offense occurred could help the injured community heal. Using more local correctional resources would bring parole back into the *Blakely* fold while simultaneously improving an area rife with problems.[423]

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[420] PETERSILIA, *supra* note 237, at 87.

[421] Travis, *supra* note 7.

[422] As Kevin Reitz pointed out, parole boards are notoriously inefficient and disappointing. *See* Reitz, *supra* note 216, at 1117–18.

[423] For more on the distinct problems facing state parole systems, see LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA'S CORRECTION CRISIS: TIME IS RUNNING OUT (2007), *available at* http://www.lhc.ca.gov/lhcdir/report185.pdf.

b. *Post-Release Supervision*

Most states have a supervised period for offenders following incarceration, although some states call it parole, some call it probation, and some call it post-release supervision. For clarity's sake I will refer to this supervised period as post-release supervision, notwithstanding the various nomenclatures used. The terms and duration of post-release supervision are usually set by the state legislature, with the duration of the supervision tied to type and level of felony committed. Post-release supervision functions in addition to any early or conditional release, since it is usually imposed only after the majority of the original sentence has been served. Usually, the more violent or dangerous the offense (as determined by the state legislature), the longer the term of supervised release.[424]

New York provides an excellent example of how post-release supervision can be a significant punishment. Since 1998, all violent New York felonies must include a period of post-release supervision, ranging from one to five years.[425] Although the term of supervision imposed can vary depending on the degree of the crime and the defendant's criminal record,[426] the supervision is mandatory, and thus has a "definite, immediate and largely automatic effect on defendant's punishment."[427] As the New York Court of Appeals has noted: "Postrelease supervision is significant . . . . In addition to supervision by and reporting to a parole officer, postrelease supervision may require compliance with . . . conditions . . . including, for example, a curfew, restrictions on travel, and substance abuse testing and treatment. . . . A violation of a condition of postrelease supervision can result in reincarceration . . . ."[428]

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[424] *See, e.g.*, KAN. STAT. ANN. § 22-3717(d)(1)(D)(i) (Supp. 2006) (imposition of an extended post release supervision period for sex offenses); N.Y. PENAL LAW § 70.45(2)(a) (McKinney Supp. 2007).

[425] In 1998, the New York legislature eliminated parole for all violent felony offenders, and enacted a determinate sentencing scheme to be followed by periods of mandatory post-release supervision. *See* 1998 N.Y. Laws ch.1. The legislature defined each determinate sentence to "also include[], as a part thereof, an additional period of post-release supervision." N.Y. PENAL LAW § 70.45(1) (McKinney 2004 & Supp. 2007).

[426] *See* N.Y. PENAL LAW § 70.45(1) (McKinney 2004 & Supp. 2007).

[427] People v. Catu, 825 N.E.2d 1081, 1082 (N.Y. 2005).

[428] *Id.*

Thus, post-release supervision, overseen by the same bureaucratic and/or judicial functionaries who supervise probation and parole, is another hidden sentencing proceeding that may fall under the purview of *Blakely*.[429]

Because the post-release supervision term is determined by the legislature, not the trial court, the *Blakely* problem only arises later, when the defendant is released from incarceration and must meet with his probation or parole officer on a weekly or bi-weekly basis. Any violation of post-release supervision, which can range from association with known felons, to consuming alcohol, to owning a gun, to failing to meet regularly with a counselor, can potentially result in the released prisoner being placed back into prison, up to ten years in certain cases.[430] This system of oversight raises a similar problem to that of probation revocations: the failure to have the jury determine any of the facts regarding supervision violations, violations that can result in longer sentences and increased punishment.

In some cases, the increased punishment resulting from an offender's violation of post-release supervision can extend the offender's prison term longer than even the maximum envisioned by the legislature. This seems a clear-cut violation of even the narrow definition of *Blakely* requiring that only juries can determine facts that increase the sentence beyond the maximum. By permitting a term of post-release supervision to be tacked onto certain violent felonies *in addition* to the standard term of imprisonment and allowing this special term to be supervised by the same bureaucracy that enforces parole and probation, the actors increasing an offender's punishment are very far away from the constitutional ideal. Although state legislatures do have the right to impose extra punishments, like post-release supervision, onto particular crimes, the oversight of such supervision must be improved to meet with *Blakely*'s requirements.

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[429] In 2003, the Kansas Supreme Court held that its post-release supervision period for sexually violent crimes did not violate *Apprendi* because the defendant pleaded guilty to the charge. *See* State v. Walker, 60 P.3d 937, 940 (Kan. 2003). No challenge has yet been raised under *Blakely*.

[430] *See, e.g.*, CAL. PENAL CODE § 3000(b)(3) (West Supp. 2007). The statute provides:

> [I]n the case of any offense for which the inmate has received a life sentence . . . the period of parole shall be ten years. Upon the . . . grounds that the parole inmate may pose a substantial danger to public safety, the Board of Prison Terms shall conduct a hearing to determine if the parolee shall be subject to a single additional five-year period of parole.

Id.

c. *Restitution*

Judges often have wide discretion over the restitution imposed on a criminal defendant. Although the decision of *when* to impose restitution is normally decided by the legislature, the *amount* of restitution imposed is usually made solely by the trial court. I include restitution in my discussion of back-end procedures because although the trial court decides the amount of restitution during the sentencing hearing, the payment of such invariably happens afterwards.

There are two ways in which a judge's determination of the restitution amount may violate *Blakely*'s animating principles. First, unless the court is simply imposing a set amount dictated by the legislature, it must find facts to determine the total sum, including the level of harm to the victim, the offender's intent in committing the crime, and the offender's ability to pay. Not all of these facts will have been previously found by the jury at trial, so the court will often have to engage in de novo fact-finding. Second, and more generally, a higher amount of restitution than the minimum set by the legislature could potentially be viewed as an enhancement of the sentence, since the greater the restitution, the more burden on the defendant.

Scholars and courts are divided about whether restitution is a criminal or civil penalty.[431] Proponents of the latter argue that restitution is essentially a civil remedy, not a criminal penalty, and thus the Sixth Amendment does not apply. This line of reasoning has been adopted by a majority of the federal courts, including the Third,[432] Fifth,[433] Sixth,[434] Seventh,[435] Eighth,[436] Ninth,[437] and Tenth[438] Circuits, which have decided that the *Apprendi-Blakely* line of cases does not prohibit fact-finding for restitution orders. The

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[431] *See* Brian Kleinhaus, Note, *Serving Two Masters*, 73 FORDHAM L. REV. 2711, 2714 (2005) (arguing that since restitution is a form of punishment for convicted criminal defendants, *Blakely* should apply); Grant Mainland, Note, *A Civil Jury in Criminal Sentencing*, 106 COLUM. L. REV. 1330 (2006); Melanie Wilson, *In* Booker*'s Shadow*, 39 IND. L. REV. 379, 394 (2000) (arguing that the MVRA violates the Sixth Amendment).

[432] United States v. Leahy, 438 F.3d 328, 338 (3d Cir. 2006) (en banc).

[433] United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam).

[434] United States v. Sosebee, 419 F.3d 451, 462 (6th Cir. 2005).

[435] United States v. Day, 418 F.3d 746, 751 n.2 (7th Cir. 2005).

[436] United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005).

[437] United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005).

[438] United States v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005).

issue is not as easily resolved as that, however, as demonstrated by the Third Circuit's sharply divided en banc opinion in *United States v. Leahy*.[439]

In *Leahy*, the Third Circuit ordered rehearing en banc in three separate appeals to determine whether either of the trial courts' orders of restitution[440] violated the defendant's Sixth Amendment right to trial by jury under *Blakely* and *Booker*. The defendants argued that the facts underlying the orders of restitution—found by the respective district courts—should have been submitted to a jury and established by proof beyond a reasonable doubt.[441] In a seven-to-five vote, the *Leahy* en banc court held that the amount of restitution need not be admitted by a defendant or proved to a jury, since under the Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA), restitution is not the kind of criminal punishment protected by the Sixth Amendment.[442]

Although admitting that restitution orders made pursuant to criminal convictions were criminal penalties, the Third Circuit decided that "a restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence."[443] Arguing that the jury's verdict automatically triggered restitution in the full amount of each victim's losses, the *Leahy* majority concluded that under the MVRA and VWPA, restitution was both authorized and required, as the district court merely gave "definite shape" to the specific sum.[444] The majority contended that restitution was a different kind of criminal punishment than the criminal punishment of prison sentences, since restitution did not "transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged."[445] Paradoxically, the Third Circuit argued that restitution was simultaneously a criminal punishment, but not truly—that the "fiscal realignment" mandated by statutory restitution, despite its

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[439] *See* United States v. Leahy, 438 F.3d 328 (3d. Cir. 2006) (en banc) (majority opinion seven judges, dissenting opinion five judges).

[440] *Leahy* also addressed whether a district court's order of forfeiture violated the Sixth Amendment (holding that it did not). *See id.* at 333.

[441] *Id.* at 332.

[442] *Id.* at 335–36.

[443] *Id.* at 337.

[444] *Id.* at 337.

[445] *Leahy*, 438 F.3d at 338.

amount being determined by a court, did not really increase the punishment borne by the defendant, since it was a "return to the status quo."[446]

By this type of reasoning, however, the entirety of a defendant's sentence itself might not be subject to the *Apprendi-Blakely* line of cases. If part of the reason for imposing punishment through a jury, under the Sixth Amendment, is to impose some sort of retributive penalty on the offender, and thus pay back the victim and the community for the moral wrong done to it/them by the defendant, then *all* punishment is based on a return to the status quo. Essentially, there is no type of criminal punishment—from imprisonment to fines to community service to probation—that does not serve to return the community and victim to their starting point. Thus, if the Third Circuit's argument is followed to its logical conclusion, its exclusion of restitution orders under *Blakely* swallows up the rule.

At least two of the judges in the majority, however, were uncomfortable with the majority's application of *Blakely* to restitution. Judges Fisher and Barry concurred only in the majority's holding that restitution was not the type of criminal penalty to which the right to a jury trial would attach, refusing to reach the conclusion that restitution orders did not constitute an increase in punishment beyond the statutory maximum for an offense.[447]

The *Leahy* dissent, like the concurrence, dissented only from the majority's conclusion that under *Blakely* and *Booker*, a judge can determine the amount of restitution under the MVRA or VWPA without violating the Sixth Amendment.[448] The dissent did not believe the facts determining the amount of restitution could be found by a district court following the Supreme Court's recent Sixth Amendment jurisprudence, arguing that "the relevant inquiry is one not of form, but of effect—does the required finding [of the amount of loss] expose the defendant to a greater punishment than that authorized by the jury's verdict?"[449] If, as the dissent argued, the statutory maximum under *Blakely* was "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,"[450] then it would be difficult, if not impossible, to exclude restitution from this sweep.

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[446] *Id.*

[447] *Id.* at 339 (Fisher, J., joined by Barry, J., concurring in part and in the judgment).

[448] *Id.* at 339 (McKee, J., concurring in part and dissenting in part).

[449] *Id.* at 344 (McKee, J., concurring in part and dissenting in part) (alteration in original) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

[450] Blakely v. Washington, 543 U.S. 296, 303 (2004) (emphasis omitted).

The dissent also pointed out that the majority's attempt to "avoid the logical consequence of that rule"[451] by claiming that the "additional facts" found by the judge to impose restitution are "not really additional facts at all"[452] was an ill-disguised attempt to suggest that restitution was simply a restorative remedy, not an additional punishment.[453] As the dissent noted, "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed."[454]

More important for this analysis, however, was the dissent's argument, repeated several times throughout the opinion, that both *Blakely* and *Booker* held that the Sixth Amendment applied to *any* fact-finding that increased the sentence beyond that which could be imposed by the jury's verdict alone. These holdings were not limited to mere increases of length of imprisonment.[455] Because the Supreme Court did not limit its Sixth Amendment analysis "by defining 'statutory maximum' as the maximum sentence of incarceration or confinement (rather than punishment) that a judge may impose on the basis of the verdict alone,"[456] there is no reason to exempt restitution from *Blakely*'s ambit. The bright-line rule created by the Supreme Court cannot be avoided through artificial divisions of what "really" is punishment and what is not—or, in the words of the *Leahy* dissent, "a distinction between punishment in the form of incarceration on the one hand, and punishment in the form of restitution on the other."[457]

This larger point is most relevant to the question of imposing restitution in the states. Assuming that at least some states would classify restitution as a criminal—not civil—punishment, it seems only rational that judicial fact-finding during the imposition of restitution might be disallowed by *Blakely*. This is particularly true where the restitution is paid directly to the State, as opposed to the victim. In that case, there is no possibility of simply separating the restitution element from the criminal proceeding and providing a civil remedy to the victim to be litigated separately. Instead, because the State can be the money's recipient, the act of providing restitution can also be classified as criminal.

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451 *Leahy*, 438 F.3d at 343.

452 *Id.*

453 *See id.*

454 *Id.* at 344.

455 *Id.* at 347.

456 *Leahy*, 438 F.3d at 347.

457 *Leahy*, 438 F.3d at 348.

Equally troubling are some of the state procedures used to determine the amount of restitution. In California, for example, if the offender is not statutorily eligible for probation, the trial court refers the matter to the probation officer, who "investigat[es] . . . the facts relevant to determination of the amount of a restitution fine . . . in all cases where the determination is applicable."[458] In other words, instead of having a jury or even a judge find facts that increase an offender's penalty, California has a probation officer perform that function. The California trial court has the discretion to direct a probation officer to "investigate all facts relevant to the sentencing of the person,"[459] which presumably includes any fact-finding about the offender relevant to restitution. When the probation officer makes a written report of his findings, the findings must include a recommendation for the amount of restitution necessary.[460]

California adds yet another layer of bureaucracy and distance from the legitimacy of a jury by permitting the court to use both the probation officer[461] and a county financial evaluation officer to help set the amount of restitution.[462] The probation officer investigates the viability of the statutory restitution fine, including investigating "all facts relevant to the sentencing of the person,"[463] thus determining the first set of financial facts. The financial evaluation officer then interviews the offender to determine her financial ability to pay restitution, reporting the findings to the probation officer.[464] Thus, the fact-finding performed to determine how much the offender can afford is three levels removed from any legitimate fact-finding. The determination goes from the financial evaluation officer to the probation officer to the court, without the jury's say.

Likewise, Florida's conditional release program can impose a payment equaling the cost of supervision onto the released prisoner.[465] Florida's probation commission, which has sole authority to determine whether and how much to order such repayment, considers the amount of the debt, the financial resources of the released prisoner, his present and potential future

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458 CAL. PENAL CODE § 1203(g) (West 2004).

459 *Id.*

460 *Id.*

461 *See id.*

462 *See* CAL. PENAL CODE § 1203(j) (West 2004).

463 CAL. PENAL CODE § 1203(g) (West 2004).

464 *See* CAL. PENAL CODE § 1203(j) (West 2004).

465 FLA. STAT. § 947.1405(2) (2005).

financial needs and earning ability, and any other appropriate factors.[466] Under Florida law, the financial determination is wholly bureaucratic.

Contrast this with the Tennessee Court of Criminal Appeals, which recognized the breadth of *Blakely*. That court specifically observed: "[T]he *Blakely* Court . . . spoke in broader terms of the power to *punish*: When a judge inflicts *punishment* that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the *punishment*,' . . . and the judge exceeds his proper authority."[467]

The Tennessee court also noted that the state's existing case law expressly recognizes that the role of restitution is not merely to compensate the victim, but also "to punish and rehabilitate the guilty"—a key tool for Tennessee criminal punishment.[468] Specifically, restitution in Tennessee is "part of the sentencing scheme and in the nature of a penalty for crime"[469]—in other words, a criminal, not a civil, penalty.[470]

If restitution, as I argue above, can be legitimately viewed as a criminal penalty, then the rule of *Blakely* logically applies—and as such, requires such factual determinations currently performed by either the trial court or the probation department to be determined by a more democratic body. Carving out a special *Blakely* exception for restitution orders may seem to be the easiest way for now, but ignores *Blakely*'s true impact on hidden aspects of sentencing.

V. CONCLUSION

It is time to reform ancillary sentencing proceedings to comply with *Blakely*'s requirements. First, doctrinally, the Supreme Court's understanding of the Sixth Amendment embraces the hidden front- and back-ends of sentencing proceedings. Second, theoretically, it is unclear whether most ancillary sentencing procedures actually work in the way they are intended, either rehabilitatively, retributively, or on the basis of deterrence.

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[466] FLA. STAT. § 947.1405(2) (2005).

[467] State v. White, No. W2003-00751-CCA-R3-CD, 2004 WL 2326708, at *23 (Tenn. Crim. App. Oct. 15, 2004) (quoting Blakely v. Washington, 542 U.S. 296, 303 (2004)) (alteration in original).

[468] *Id.* at *24 (emphasis omitted).

[469] *Id.*

[470] Despite its expansive views of *Blakely*, however, the *White* Court held that a judicial finding of an amount of restitution does not run afoul of the Due Process or Sixth Amendment guarantees as interpreted in *Blakely*, since no Tennessee statutes specify a maximum amount of restitution. *See id.*

These arguments combine to create a new way to think about both hidden sentencing procedures and the rights due to offenders after the trial has ended and the punishment has begun.

Ultimately, extending the animating principles of *Blakely* calls a variety of ancillary sentencing proceedings into question. Our understanding of sentencing has far too often been satisfied with mere superficiality, with little interest in exploring the jurisprudential undercurrents that have animated all aspects of sentencing, front-end and back-end.

Faced with a new paradigm of sentencing rights based on retributive justice, however, we can no longer ignore the skewed workings of sentencing proceedings as a whole. Once the *Blakely* Court focused on the traditional role of the community in imposing punishment, the scope of sentencing widened: not only must the community have its say in sentencing the offender at the actual sentencing hearing, it must also have some sort of imprimatur in the hidden aspects of our sentencing proceedings, from beginning to end. Excluding front- and back-end sentencing proceedings from the reach of the community's values is doing precisely what Blackstone foresaw in his crusade against "secret machinations" eroding the jury right.

When we fully incorporate the community's role in imposing punishment, we may well suffer some "delays" and "little inconveniences" in sentencing offenders. Although the rush to justice—which happens far too often in our criminal justice system with charge-bargaining, guilty pleas, and appeal waivers—may resist the time it takes to fully provide an offender with all of her Sixth Amendment rights, the unregulated, "invisible punishments"[471] imposed during the hidden phases of sentencing can have an outsized effect.

The contours of my expressive retributive theory of sentencing sketched out above are not absolute; unlike the Court, I do not seek to draw any bright-line rules. But whatever the limits of this jurisprudence may be, I am sure that it encompasses hidden sentencing. Our system of front- and back-end sentencing has for too long been "invisible, hidden from public view, difficult to discern in part because we do not use the language of punishment, criminal sanctions, and sentencing to describe these phenomena."[472] It is well past time that these ancillary sentencing proceedings come into the *Blakely* fold.

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[471] *See* Travis, *supra* note 7, at 4.

[472] *Id.*